RENOVATING THE FOUNDATION:
PROPOSALS FOR A
MODEL LAND RECORDING AND REGISTRATION ACT
FOR THE PROVINCES AND TERRITORIES OF CANADA

JOINT LAND TITLES COMMITTEE

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THE JOINT LAND TITLES COMMITTEE

This Report and Model Act have been produced by the Joint Land Titles Committee, which was established to devise a model title registration statute suitable for use in the provinces and territories of Canada. The Joint Committee includes representatives of the Governments of Alberta, British Columbia, Manitoba, the Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan and the Yukon, and of the law reform commissions of the prairie provinces and British Columbia.

The foundation of the Joint Land Titles Act project is original work which was done by Professor Thomas W. Mapp for the Alberta Law Reform Institute, and the Institute, through Professor Mapp and W.H. Hurlburt has provided drafting services. The Model Act is, however, a collegial product: every issue has been debated by the Joint Committee and the Model Act implements the Joint Committee's collective decisions.

The British Columbia representatives on the Joint Committee are concerned about the degree to which the Model Act diverges from the existing British Columbia statute and practise. They have, however, taken full part in the Joint Committee's discussions, and the Model Act reflects their personal contributions.

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PART I - SUMMARY

Source of report and Model Act

This report, and the Model Act which embodies its proposals, have been prepared by a Joint Land Titles Committee consisting of land registration officials from Alberta, British Columbia, Manitoba, the Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan and the Yukon.

Purpose of Model Act

The basic purpose of the Model Act, like any system of interest recording and title registration, is to make acquiring and disposing of interests in land easy, quick, cheap and safe, while protecting security of ownership.

The Model Act is intended to improve the efficiency and maximize the utility of interest recording\title registration systems by stating basic principles more clearly and coherently, by resolving previously unresolved problems, and by making some policy changes to accommodate title registration law to current and future needs. It will not change basic principles. It will facilitate current practises.

Reasons for revision of title registration statutes

Existing interest recording\title registration statutes are based on precedents more than a century old. Their language is opaque, misleading, and not suited to modern conditions. Their organization does not disclose the principles on which they are based. Their inclusion of much substantive law and administrative matter further obscures those principles. They require rationalization and modernization.

Nature of system proposed by Model Act

Most of the existing Canadian title registration statutes are really hybrid interest recording\title registration statutes. These hybrids have worked well, and the Model Act builds upon them by providing:

(a) an interest recording system, under which an entry in a register confirms or confers priority of the interest according to the time of registration, but does not confer ownership; and

(b) a title registration system, under which an entry in a register stating that a person is registered as owner of an interest in land both confirms or confers legal ownership of the interest as a matter of law and confirms or confers priority of the interest according to the time of registration.

Interest recording system

Recording under the Model Act will have much the same effect as lodging or registering a caveat under the Canadian Torrens-based statutes other than British Columbia, entering a notice under section 74 of the Ontario Land Titles Acts, and registering a deed under the deed registration systems which exist in parts of Manitoba and Ontario, all of which are different versions of interest recording systems. It will be effected by submitting to the Registrar either a document conferring an interest or a document summarizing an interest. The Registrar will not examine a document submitted for recording to see that the interest claimed is valid.

The recording of an interest which is a prior interest under the general law will maintain its priority over subsequent interests. The recording of an interest which is a subsequent interest under the general law, if the holder of the subsequent interest has given value and is not guilty of fraud, will confer on the subsequent interest priority over all other interests which were not recorded when the subsequent interest was obtained and recorded. The priority so obtained will benefit a successor as well as the person who records the interest.

Under the recording provisions of the Model Act, any interest in land can be recorded.

Title registration system

The title registration system proposed by the Model Act is the same in broad outline as existing title registration systems. It will apply to estates in fee simple absolute and to a number of the better known and most widely used lesser interests, of which leases and security interests are examples. It will confer legal ownership of an interest upon the registered owner of the interest.

Under the title registration provisions of the Model Act, a registration obtained by the fraud of the registered owner can be set aside, but not a registration obtained by an innocent successor of the fraudulent party. A registration which is not based upon a valid transaction (for example, a registration based upon a forged or unauthorized transfer) can be set aside before an innocent successor is registered, but if the "transferee" believed the transfer to be valid, the Court will be able to award ownership to either the transferee or the displaced registered owner and compensation to the other, with a presumption in favour of restoring the displaced registered owner and compensating the transferee.

Under the title registration provisions of the Model Act, an estate in fee simple absolute and a number of other well-known and understood interests in land may be registered.

Other matters

The Model Act opts for individual registers instead of the certificates of title which now, in some provinces, constitute a single register covering all the land within the jurisdiction of a land registration office. It contemplates the continuation of administrative and land identification systems along current lines. It contemplates the continuance of a system of compensation for losses sustained through the malfunctioning of the system, but emphasizes treating compensation as a business matter flowing inevitably from the measures taken to promote business efficiency.

Conclusion

It is the Joint Committee's view that the Model Act, if adopted, will provide a rationalized and helpful framework for dealings in land, will reduce confusion and uncertainty, and will maintain harmony among Canadian title registration laws among the provinces and territories of Canada.

PART II - REPORT

A. Introduction

The Model Land Recording and Registration Act included in this report is intended to provide a sound statutory foundation for Canadian title registration systems with a view to maintaining and promoting the efficiency of those systems. It does not change basic principles. It facilitates current practises.

B. Format of this Report and Model Act

It is the Model Act which embodies the Joint Committee's views. However, the additional materials which follow will assist the reader in two ways. First, this Report, Part II, includes a brief description of the policies reflected in the Model Act and the reasons for adopting them. Second, annotations to the Model Act explain the ways in which specific provisions implement those policies.

It follows that the reader will get from this Report, Part II, a statement of the important general principles reflected in the Model Act, but must turn to the Model Act itself and to the annotations to get a detailed understanding of the proposed interest recording\title registration system which the Joint Committee are putting forward.

C. Purposes of Project

(1) Improvement of existing statutes

The first purpose of the Model Act is to make title registration systems more efficient and to enable users to use them more easily and more confidently. It states basic principles more clearly and coherently than do the existing statutes. It tries to solve previously unsolved problems. It suggests some policy changes to accommodate title registration law to current and future needs.

The existing title registration statutes are based on 19th century Australian or English statutes. Some of their central concepts have served us well. However, they leave problems unsolved. They are opaque, and sometimes downright misleading. They have had to be tortured by courts into new forms to meet current conditions. They hide the light of title registration under bushels of substantive law and administrative detail. They require rationalization and modernization in the light of nearly a century and a half of experience of title registration.

(2) Harmonization of laws

The second purpose of the Model Act is to promote uniformity, or at least harmony, of title registration laws in Canada. The need for rationalization of the statutes creates a significant danger of parochial unharmonious reforms. The enactment by the provinces and territories of title registration statutes along the lines of the Model Law would remove this danger and ensure the continuance and increase of statutory harmony among them.

Uniformity of title registration legislation in Canada, or at least harmony, is a desirable end in itself. It promotes business business efficiency, the development of common jurisprudence, and the development of common feeling across the country. The Joint Committee have therefore tried to devise a model statute which will be suitable for any Canadian common law province or territory.

D. Scope of Model Act

The Model Act deals only with the protection of ownership and priority of interests in land. It avoids dealing with substantive law except where a substantive provision is necessary to achieve its objectives. It accepts the general law, including the general law about the existence and nature of interests in land. Part of the process of adoption of the Model Act would be the placement in a separate part or in other legislation of the substantive law rules which are included in the present title registration statutes.

The Model Act omits the great amount of administrative detail which is found in the existing land registration statutes and which should be consigned to regulations. It does contain provisions for the basic administrative structure necessary to support a title registration system. Those provisions are illustrative only, and each enacting jurisdiction will no doubt mould them to its own needs.

The Model Act does not refer to the computer or to computerization. In the Joint Committee's opinion, the Model Act will be found functional for any form of record-keeping, from quill pen to electronic. Computerization should greatly improve service, but it is a practical matter which does not affect legal principles and rules. Computer programmes can accommodate the Model Act as efficiently as they can accommodate the existing title registration statutes.

E. Security of Ownership and Facility of Transfer: Problems and Solutions

A land titles and conveyancing system should have two purposes. One is to provide security of ownership, that is, it should protect an owner against being deprived of ownership except by his or her own act or by the specific operation of a legal process such as expropriation or debt collection. The other purpose is to provide facility of transfer, that is, it should enable anyone, particularly a purchaser, to acquire ownership easily, quickly, cheaply and safely. Unfortunately, a measure designed to achieve one of these purposes is likely to militate against achieving the other.

The common law did not recognize a transfer of ownership except by a transaction binding upon the owner. It thus gave a high degree of security of ownership. By doing so, however, it created a number of problems for a purchaser: (1) determining the adequacy of all title instruments relevant to the seller's derived title; (2) determining the adequacy of the immediate transfer to the purchaser; (3) accounting for any lost instruments; (4) the possible existence of unknown legal interests granted by the seller or an earlier owner; and (5) the possible existence of unknown prior equities, a possibility which was exacerbated by the doctrine of constructive notice of equities which would be discovered by reasonable investigation.

There was one kind of interest to which the common law did not give adequate protection, that is, equities. An equitable interest in a parcel of land could be lost if the land was acquired by a *bona fide* purchaser without notice of the equity.

A deed registration system (which we will henceforth call an interest recording system) shifts the balance significantly towards facility of transfer. It provides a public register of interests in land and enables a purchaser who complies with the system to acquire ownership free of a prior interest which is not recorded in the register. It thus solves problems (3), (4) and (5) listed above and increases facility of transfer.

A title registration system shifts the balance even more towards facility of transfer. Like an interest recording system, it enables a purchaser to acquire ownership free of prior interests not reflected in a register. However, it goes further. It declares that a registered owner is the owner of the registered interest and thus makes it unnecessary for the purchaser to assure himself or herself of the adequacy of the instruments relevant to the seller's title, thus solving problem (1) listed above. It may go further still and make it unnecessary for a purchaser who procures registration to assure himself or herself of the adequacy of the immediate transfer from the seller and thus solve problem (2). Title registration law in at least some of the title registration systems in the participating jurisdictions goes this far.

A title registration system coupled with an interest recording system can also solve the problem of protecting an equity by providing that the recording or registration of the equity will assure its priority.

The land titles statutes of British Columbia, Ontario, the prairie provinces and the two territories include full-blown title registration systems. All of these but British Columbia include what are really full-blown interest recording systems, which are based upon the entry of notices in Ontario and the registration of caveats in the prairie provinces and the territories; the British Columbia system of registration of charges is a somewhat different solution to the problems of interests which are not fully registrable as it confers not only priority but also a rebuttable presumption of ownership. All of the statutes contain elements of the common law system. All of them include systems of compensation for losses caused by malfunctioning of the interest recording/title registration systems. Appropriate combinations of these elements are highly functional, and the Model Act is such a combination.

F. Elements of Proposed System

(1) Terminology

Throughout this report, we will use the terms "recording" (or "interest recording") and "registration" (or "title registration"). These are terms of art. The usage is well known, but, for purposes of clarity, will be explained briefly here.

"Recording", in its ordinary meaning, is the making of a record. When used in the context of an interest recording system it is a term of art which includes both administrative acts and a legal consequence. The administrative acts are the making of an entry of a document in a register and the retention of the document, or a copy, in the land registration office which maintains the register. The legal consequence is the confirmation or conferring of priority on the interest. Section 1.1(j) of the Model Act, therefore defines "recording" as "the administrative process which, under this Act, secures priority of enforcement for an interest by means of entries in a register".

"Registration", in its ordinary meaning, is the making of an entry in a register. This is much like the ordinary meaning of "record", but requires that the record be in a register. When used in the context of a title registration system "registration" is, like "recording", a term of art which includes both administrative acts and a legal consequence. The administrative act is much the same as the administrative act included in "recording", though it involves the use of different words. The legal consequence is more extensive: "registration" confirms or confers not only priority, but also ownership. Section 1.1(l) of the Model Act, therefore defines "registration" as "the administrative process which, under this Act, confers, affects or confirms interests by means of entries in a register". As section 5.3(4) of the Model Act provides that the registration of an interest records the interest (unless it was previously recorded), registration has the same consequences with respect to priorities as does recording.

The difference between the legal consequences of "recording" and "registration" is thus that recording confers priority only, while registration confers both priority and ownership. The physical process is much the same, though different words will be used.

"Deed registration" also consists of the administrative act of making an entry in a register and the legal consequence of the conferring or confirmation of priority. "Interest recording" is another name for a deed registration system, though it may take different forms: Manitoba and Ontario, for example, have deed registration systems as well as interest recording\title registration systems. In Alberta, Manitoba, Saskatchewan and the two territories, the "registration" of "caveats" has evolved into interest recording, as it also involves the making of entries in a register and the conferring or confirmation of priority, and in Ontario the entering of notices has much the same effect.

The similarity of the terms "recording" and "registration", and the use of the term "registration" in respect of deed registration and caveat registration, create some difficulties of communication and comprehension. However, we think that if "recording" is rigorously used to denote a system of conferring and confirming priorities and "registration" is used to denote a system of conferring and confirming both priorities and ownership, the terminology will be found to be convenient and useful.

(2) Outline of proposed system

The interest recording\title registration system which is proposed by the Joint Committee includes the following elements:

(1) an administrative system;

(2) a system of land descriptions based on surveys;

(3) a system of registers;

(4) the common law system of conveyancing and titles where it is not inconsistent with the interest recording\title registration system;

(5) an interest recording system;

(6) a title registration system;

(7) a system of overriding interests;

(8) a compensation system.

It will be seen that the elements of the proposed system are the same as those which comprise the existing Canadian interest recording\title registration systems. In the British Columbia system the fourth and fifth elements are a system of registration of charges and a system of registration of fee simple estates respectively.

This report will now describe the listed elements individually.

G. Description of Proposed System

(1) Administration

Interest recording, as has been noted above, is an administrative process from which legal consequences flow. So is title registration. Administration is as integral and necessary a part of the whole interest recording\title registration system as is law.

Existing interest recording\title registration systems are administered by land registration offices supervised by Registrars. Sections 2.1 and 2.2 of the Model Act make general and illustrative provision for a similar administrative system. Section 2.2 also provides for a central official who is designated as a Registrar General and who is the counterpart of existing officials who have different titles in different provinces and territories. Administrative structures will, of course, be designed to meet the individual requirements of the provinces and territories which establish them.

Regulations under section 2.3 will provide for all other administrative matters and will prescribe the administrative requirements for documents. The requirements for documents submitted for *recording* should be restricted to ensuring that the documents are physically capable of easy processing and provide the necessary information about the person effecting the recording. The requirements of form and authentication for documents submitted for *registration* will be more onerous, but should not be so onerous as to inhibit legitimate activity.

In summary, the Model Act provides for the continuation of administrative systems, the basic features of which will be included in the statute, with everything else in regulations.

(2) Land descriptions and surveys

An adequate system of identification on the ground of parcels described in land registration office registers is an integral part of existing interest recording\title registration systems in Canada. Land is usually identified by reference to survey plans which are part of the records of the land registration offices and which, in the case of all but the oldest plans, have been checked and approved by land registration office officials.

Existing plan-based systems work well. Current and foreseeable conditions dictate that they be continued. A plan-based system of identification of parcels of land should therefore be a component of the proposed interest recording\title registration system. In the Joint Committee's view, however, the administrative requirements necessary to maintain the identification system should not be in the statute, and the Model Act does not include such requirements. What it does do, through section 2.3(e), is to provide for regulations prescribing requirements as to legal descriptions of land and the preparation, form, approval and use of plans of survey.

In summary, the Model Act provides for the continuation of the present plan-based systems of identification of parcels of land. Such a system is an integral part of the proposed interest recording\title registration system, but should be provided for in regulations rather than statutory provisions.

(3) Registers

Interest recording depends upon entries in registers. So does title registration. Registers are therefore an integral part of an interest recording\title registration system.

Under most of the existing statutes, there is one register which is composed of certificates of title and incorporates the documents memorialized upon the certificates of title. A Registrar signs and seals a certificate of title which certifies that a named person is the owner of an estate in fee simple (or occasionally of a lesser estate) in a described parcel of land. The Registrar then registers lesser interests by making entries about them on certificates of title, together with the names of the registered owners of those interests.

The Model Act, through sections 3.1 and 3.2, proposes that there be a system of individual registers for parcels (with provision for interest registers covering interests less than an estate in fee simple absolute where convenient). A parcel register will set out the name of the registered owner of the estate in fee simple absolute and the identifiers of recorded documents and documents creating other registered interests, and may have additional information as well. Entering the identifier of a document in a register will incorporate the document into the register. This is much closer to the present Ontario system of parcel registers than to a system of certificates of title.

The use of parcel registers instead of certificates of title will mean that it will not be necessary to cancel one page of the register and create another one every time an estate in fee simple absolute is transferred; it will thus minimize a cause of error which has caused trouble in the past. The proposal will result in the elimination of the duplicate certificate of title from those jurisdictions which now have it. However, the duplicate certificate of title imposes significant administrative disadvantages upon both owners and land registration offices, while the advantage of being able to deposit a duplicate certificate of title is small and may be illusory, and a certified copy of the register can be used to perform any other function which the duplicate certificate of title now performs.

The Model Act lays down the principle that registers are to be established for all land which is subject to the Act. It leaves everything else to administrative discretion and to regulation, including the procedure to be followed before a register is established and a parcel of land, or an interest in it, is brought under the Act, and also including the geographical extent of a parcel to be covered by a parcel register, the fee simple estates on, over or under a a geographical area for which a parcel register will be established, and the circumstances under which interest registers should be established for interests less than estates in fee simple absolute.

In summary, the Model Act provides for a system of registers which includes:

(1) the establishment of parcel registers, each covering a parcel of land described in it, and collectively covering all land in the enacting jurisdiction which has been brought under the interest recording\title registration statute (sections 3.1 and 3.2);

(2) the establishment, where convenient, of interest registers based on parcels but covering lesser interests (sections 3.1 and 3.2);

(3) the registration of owners of estates in fee simple in parcel registers and the registration of owners of lesser interest in either parcel registers or interest registers;

(4) the recording of documents and the registration of interests other than estates in fee simple absolute by the entry of document identifiers in parcel and interest registers, and the automatic incorporation of the documents themselves into the registers.

(4) Common law conveyancing and title

The Model Act's interest recording\title registration system floats on the general law. The Model Act provides for the recording and registration of "interests", and "interest", under section 1.1(e), means "any estate or right in, over or under land recognized under law", so that it is the general law which determines what interests exist and what their incidents are. Section 4.5(1) confirms the effectiveness and priorities of interests as determined by the general law. Recording and registration will displace common law priorities and common law ownership, but not always, and only to the extent necessary to allow ownership of interests in land to be dealt with efficiently.

This is much the same as the present law under Canadian interest recording\title registration systems. The Model Act merely states explicitly what has to be gleaned from hints in the existing statutes and, in some jurisdictions, from judicial decisions which have given robust interpretations to opaque statutory language.

(5) Interest recording

(a) Nature of the proposed interest recording system

An interest recording system, as has already been said, determines priorities among interests. It has nothing to do with the existence, nature or ownership of interests.

The interest recording system proposed by the Model Act, as has been noted, corresponds to the existing caveat systems of the Canadian Torrens-based statutes other than British Columbia (where the caveat gives only temporary protection). It also corresponds to the notice system under sections 74 and 75 of the Ontario Land Titles Act, though the latter operates by affecting persons who acquire interests in land with notice of interests entered on the register rather than by specifically providing for priorities. The Model Act merely rationalizes these systems and makes their consequences explicit.

(b) Reasons for an interest recording system

The fact that interest recording confers or confirms only priority, while registration of title confers or confirms both priority and ownership, might suggest that title registration should apply to all interests in land and that interest recording should be done away with.

As has been noted, an interest recording system solves the problems created at common law for those acquiring ownership of land by the losing of instruments necessary to a transferor's title; by the possible existence of unknown legal interests granted by the seller or an earlier owner; and by the possible existence of unknown prior equities, which latter problem is exacerbated by the doctrine of constructive notice of equities which would be discovered by reasonable investigation. An interest recording system thus increases facility of transfer. This is its reason for existence.

Although a title registration system solves more problems, there are two reasons for maintaining an interest recording system in addition to a title registration system. The first is that, for reasons which are developed more fully below (see G.(6)(c)), the law cannot effectively guarantee ownership of all interests in land and would seriously mislead people if it were to try extend title registration to all interests. The second is that land registration staff can record a document almost immediately upon receipt and thus ensure its priority for whatever it is worth, while the verification procedures necessary for registration take a much greater time and may involve returning documents for correction. It is for these reasons that the Model Act provides for an interest recording system as well as for a title registration system.

(c) Interests which may be recorded

The law should enable the owners of all interests in land to protect their interests. Section 4.1 of the Model Act therefore provides that "any interest may be recorded if it is in land which is subject to this Act...", and the definition of "interest" in section 1.1(e) includes all interests recognized by the general law.

The converse principle is that nothing which is not an interest in land recognized by the general law should be recorded under a system dealing with interests in land. Section 4.1 therefore goes on to say that "any recording which is not authorized under this section is void", and the section, as noted in the preceding paagraph, authorizes the recording of interests in land and nothing else.

(d) Procedure

Under section 4.2 of the Model Act, a person who wants to record an interest will have two choices. One is to submit to the Registrar a document in prescribed form which incorporates the document which confers the interest or a copy of that document. The other is to submit a document which summarizes the transaction on which the interest is based. The regulations will call for a cover sheet giving the name of the person who records the interest, an address for service, and any other required information.

Recording will be accomplished when the Registrar enters in the appropriate register the identifier assigned to the document submitted for recording (Model Act section 4.3(2)), though the Registrar will probably include additional information in the entry.

Registrars will not require that documents submitted for recording be authenticated, nor will they check to see that documents conferring interests are legally proper or purport to confer or summarize interests in land. That is because recording confers or confirms only priority on whatever interest the claimant has, and does not purport to validate an interest or to confer ownership of an interest.

(e) Effect of recording

(i) In general

It must be repeated here again that the interest recording system proposed by the Model Act deals with priorities among interests, and only with priorities, and has nothing to do with the existence, nature or ownership of interests.

It follows that recording does not give a legal assurance that the "interest" recorded is an interest recognized by law, or that it exists, or that it is owned by the claimant who records it, or that it affects the land against which it is recorded. Another consequence is that an interest exists without recording and continues to exist despite the termination of a recording, so long as the general law recognizes its existence, though, through the recording or registration of other interests, an unrecorded and unregistered interest may become subordinated to another interest and may become ineffective as against another interest.

It must also be repeated here that the interest recording system proposed by the Model Act is a rationalized version of the prairie and territorial caveat system and the Ontario notice system.

(ii) Recording of a prior interest

Suppose that O, the registered owner of Blackacre, grants a legal interest in Blackacre to A. A immediately acquires the interest (Model Act section 4.5(1)). Suppose that O then grants a conflicting interest to B, and that neither A's interest or B's interest is recorded or registered. A's interest, being prior in time, is entitled to priority over B's interest under the general law, which is preserved by section 4.5(1). A's concern with the interest recording system is to preserve an existing priority. Under section 4.5(2)(a) of the Model Act, the recording of A's interest confirms and continues the common law priority of the interest.

Next, suppose that the prior interest which O grants to A is an equitable one. Under the rules of common law and equity, A's interest would be defeated if B is a *bona fide* purchaser for value of the legal estate or of a higher equitable estate without notice of A's interest. The prior recording of A's interest under these circumstances will not only protect the priority which the rules of common law and equity have conferred, but will ensure that the priority will continue in circumstances in which the rules of common law and equity would not recognize the priority. Section 4.5(2)(a) thus goes farther than the common law and gives the holders of equitable interests a means of protecting themselves which was not available to them under the common law.

(iii) Recording of a subsequent interest

Suppose that the interest granted by O to A has priority over B's interest at common law, but that the interest granted by O to B has been recorded and A's interest has not.

Section 4.5(2)(b) of the Model Act reverses the common law rule and confers priority on B's subsequent interest over A's prior interest.

A number of qualifications must be made to that statement:

1. If A's interest was recorded when B's interest was either obtained or recorded, the priority of A's interest will continue even if the recording of A's interest has been cancelled, so long as A's interest is not terminated. (See Model Act section 4.5(1)(b)(iii) and (iv) and section 4.7(3).)

2. Recording will not confer priority upon an interest which was not obtained for value. (See section 4.5(2)(b)(i). See also the discussion under the heading "Volunteers" below.)

3. Recording does not confer priority upon an interest which was obtained through the fraud of the person who acquires the interest. (See section 4.5(2)(b)(ii). See also the discussion under the heading "Fraud" below.)

4. Some overriding interests retain their priority under the common law or a statute despite lack of recording. (See section 6.1 and the reference to it in section 4.5(2). See also the discussion under the heading "Overriding interests" below.)

5. Where there are two registers for the same parcel or interest, and where in each register there are recorded or registered interests derived from the interests on which the register is based, recorded interests derived from interests registered in one of those registers will be deprived of priority. (See section 5.8. See also the discussion under the heading "Conflicting registers" below.)

(iv) Effect of recording on priorities of derived interests

Suppose that O grants an interest in Blackacre to A1, who records it, and that O then grants a conflicting interest to B, who also records. Suppose that A1 then assigns the interest to A2. The recording of an interest will confer priority on the interest not only in the hands of the person who records it but also in the hands of a successor who obtains the whole interest or a derived interest from that person or from an intervening successor. (See section 4.5(3)(a).) That appears to be the present law of caveats: *Passburg Petroleums Ltd. v. Landstrom Developments Ltd.* [1984] 4 WWR 14 (Alta CA). In the example stated, the interest assigned to A2 will be enforceable with priority over B's interest.

Suppose that A1, instead of assigning to A2, has given two successive assignments of the interest to M and N. Each of M and N is entitled to have the interest enforced with priority over B's interest. As between themselves, however, the general rules of recording apply, so that if N records the second assignment first and meets the other conditions of section 4.5(2)(b) (i.e., the giving of value and the absence of fraud), M's assignment will be ineffective as against N and N will be entitled to have the second assignment enforced as against M, as well as against B.

(6) Title registration

(a) Nature of the proposed title registration system

As has been noted, a title registration system determines ownership of interests in land as well as priorities among interests. It does not deal with the recognition of interests in land or with their incidents, which are left to the general law.

When everything happens as it should, which is the the usual case, the registration of an interest confirms ownership which would be recognized by the common law. Occasionally, registration confers ownership of an interest upon a registered owner whom the common law would not have recognized as owner. The discrepancy may be caused by the failure of the true owner to record or register a prior conflicting interest, by the acceptance of an apparently valid document which is invalid, or by official error in the making of entries in a register.

The title registration system proposed by the Model Act is similar to the existing provincial and territorial title registration systems as they have evolved through statute and judicial interpretation. The Model Act merely rationalizes these systems, solves some of their problems, and makes their consequences explicit.

(b) Reasons for a title registration system

Because title registration confers or confirms both priority and ownership of interests, it not only enables a person to acquire an interest in land free of prior interests not reflected in a register, but makes it unnecessary for the person acquiring the interest to investigate the adequacy of the instruments necessary to the transferor's title. It may go even further and make it unnecessary to investigate the adequacy of the instrument which confers the interest being acquired. Title registration thus increases facility of transfer, and does so to a greater extent than does an interest recording system. This is its reason for existence.

(c) Interests which may be registered

An important question is: what interests should be capable of registration? Any interest can be recorded and thus acquire priority. Which interests should qualify for the additional protection of registration?

There are three practicable answers:

1. register only estates in fee simple absolute;
2. register estates in fee simple absolute plus a list of the most common and best understood interests in land;
3. register all interests in land except any which should be excluded from registration by some valid public policy.

Title registration should float upon the general law. It should not change substantive real property law. Before making a choice among the options listed in the preceding paragraph, it is necessary to digress to consider ways in which the general law recognizes interests in land.

The general law recognizes an estate in fee simple absolute, defines it, and prescribes its incidents. Therefore, a title registration statute can make a simple statement of law that

O is the owner of an estate in fee simple absolute in Blackacre, because the general law gives meaning to the words.

The general law recognizes the existence of a number of other estates and interests in land. It prescribes incidents which, if present, will bring a legal right into the category of a specific estate or interest in land, such as a lease, and it sometimes prescribes some legal consequences which flow from bringing a legal right into a given category. However, except for the estate in fee simple, it does not define interests so precisely that a title registration statute can merely say that A is the owner of an interest in Blackacre without in some way providing for the ascertainment of the incidents of that interest: a statement that A is the owner of a leasehold interest is not enough, by itself, to say what A's rights in the land are.

The most that a title registration statute can say about anything other than an estate in fee simple is that A is the owner of whatever estate or interest is defined by a specific transaction. A statement in a register that A is the owner of a leasehold interest does not confer a leasehold interest unless the general law recognizes as a leasehold interest whatever is conferred on A by an underlying document incorporated into the register. In other words, the title registration statute, except in the case of an estate in fee simple absolute, cannot say *what* it is that A owns in Blackacre, except by incorporating the terms of the grant to A and by leaving the definition of what is granted to be determined by the interaction of the terms of the underlying document and the general law.

It can be argued that the additional protection of registration should be available to all, or almost all, interests in land, from an estate in fee simple absolute to a springing trust. This is option (c) above.

The majority of the Joint Committee are of the view that it would not be appropriate to register an almost indefinite range of estates and interests. We do not think that, beyond certain limits, the law should purport to confirm or confer ownership of rights the nature of which has to be gleaned by interpretation of documents and of the general law and which may prove not to exist at all. Purporting to register such things is likely to lead people to think that they have more protection than they can have in the nature of things. The Joint Committee have not adopted option (c).

At the other end of the range of what is reasonable, it can be argued that all that is needed is to register estates in fee simple absolute. This is option (a). There is no doubt that this would accomplish a good deal. All that a person who wanted to acquire a lesser estate or interest would have to do would be to trace a good title back to a registered owner of the estate in fee simple absolute. In most cases, that would involve acquiring the interest either from the present registered owner of the estate in fee simple absolute or someone who has already acquired it from the present registered owner. In some cases, it would involve acquiring the interest from someone who had acquired it from a previous registered owner of the estate in fee simple absolute. The complete chain of title would usually appear from one existing register, though occasionally it might be necessary to trace the interest back to a preceding register. It can be argued that this is enough protection for lesser interests and that registration should be reserved for the estate in fee simple absolute, because it is only the estate in fee simple absolute which is fully defined by the general law so that the register can, without risk of error, say that A owns it.

However, the majority of the Joint Committee think registration should be extended beyond the fee simple absolute to a limited number of estates and interests which are sufficiently well understood and recognized by the general law that registration will be efficient and useful. These are listed in section 5.1 of the Model Act. They include life estates, leasehold estates, security interests, easements, utility interests and restrictive covenants, with options to purchase and purchasers' interests as optional additions. This list includes the great bulk of important estates and interests. The Joint Committee think that, in the case of important and comparatively well understood interests of these kinds, the importance of enabling users to obtain legal assurances of ownership outweighs the possible adverse consequences arising from the law's inability to guarantee the existence or content of the interests. The Joint Committee have therefore chosen option 2 from the list given above.

(d) Procedure

Registration will be procured by submitting to the Registrar a document which conveys a registrable interest. Such a document will be a "transaction" as defined in section 1.1(s) of the Model Act. The Registrar will then register the interest by entering the owner's name in the appropriate parcel or interest register as the owner of the interest.

Unless the interest is an estate in fee simple absolute, the Registrar will also be required to note in the register the identifier of the document which registers the interest.

The Registrar will examine a document which is submitted for registration, and will register it if the person upon whom the interest is being conferred appears to be a legal person; if the document is authenticated in accordance with the regulations and purports to confer a registrable interest; and if there is no provision of the general law which forbids the acquisition of the interest by the person upon whom it is being conferred.

(e) Effect of registration

(i) General rule

Section 5.3(1) of the Model Act declares that the registered owner of an interest is the owner of the interest. A registered owner will, by that declaration, be made the legal owner of the interest whether or not the ownership would be recognized by the common law. Section 5.3(3) and (4) will confer upon the interest priority based upon the time of registration, unless an earlier recording of the interest has already conferred a greater priority (but see the discussion under the heading "Overriding interests" below).

(ii) Conditions which must be met

The declaration of ownership will be made only if:

(1) the interest is of a kind listed in section 5.1 of the Model Act;

(2) the registered owner has legal capacity to own the interest; and

(3) the interest is recognized under law (which makes explicit something which is implicit in the requirement that the interest be of a kind listed in section 5.1).

Condition (1), that the interest be of a kind listed in section 5.1, is one of policy, and is laid down for reasons given under G.(6)(c) above. Conditions (2) and (3) recognize the impossibility of conferring ownership *of* something that does not exist under law and the impossibility of conferring ownership *upon* something that does not exist under law. If condition (1) or (2) is not satisfied, the registration is void under section 5.2(2), as well as being unauthorized under section 5.3(1). If condition (3) is not met, the registration is also void because there is nothing to register.

A registration is effective, and the registered owner is the legal owner of the interest, even though the registration was brought about by that owner's fraud or was not conferred by a valid conveyance. These situations are discussed below under the heading "Revision of registrations".

(f) Revision of registrations

(i) Revisions based on binding transactions

"Revision of registrations" means the making or cancellation of a registration or of more than one registration. "Revision of registers" would convey this meaning, but it would also include the making and cancellation of recordings and is therefore unsuitable.

Registers comprise a great body of registrations. These are constantly being revised by the making of new registrations and the cancellation of old ones.

The normal reason for making or cancelling a registration is that a registered owner has made a registrable disposition or that ownership has devolved upon a new owner by the operation of a law such as one relating to expropriation, bankruptcy or the administration of estates. Such revisions are the rule. Section 5.4(1)(a) of the Model Act provides for them.

(ii) Revisions in cases of fraud

If a registered owner, B, has obtained registration under a disposition obtained by fraud from O, the previous owner of the interest, O is entitled to have B's registration cancelled and to become registered as owner under a new registration. In this respect, title registration operates in much the same way as the common law. If B's interest and its registration were obtained in fraud of A, the holder of a prior unrecorded and unregistered interest which O had granted to A, title registration operates rather differently. This subject is discussed under the heading "Fraud" below.

(iii) Revisions where there is no valid transaction

In a case between immediate parties, if a registered owner, A, has obtained registration os an interest in land without a valid transaction at all, the previous owner, O (who is the true owner under the general law), is entitled to have A's registration cancelled and to become registered as owner under a new registration (unless A believed that there was a valid transaction). However, if another person, B, has succeeded A as registered owner and is not guilty of fraud, O is not entitled to have registrations revised. This is the essence of title registration and is needed so that anyone who acquires an interest in land can be assured that there is no A who can claim ownership once the interest has been registered in the name of the person acquiring the interest. This is the effect of Section 5.5(2)(b) of the Model Act.

If A has obtained registration without a valid transaction, but in the belief that there was one and without knowledge of the facts that rendered it invalid, the situation is different. The paradigm case is: O is the registered owner of Blackacre; a rogue forges a transfer from O to A and delivers it to A who accepts it in the belief that is is granted by O and who pays the rogue for it; and A registers the transfer and becomes registered as owner of Blackacre. Should O be entitled to have A's registration set aside and to be restored as the registered owner of Blackacre?

It was long thought in Canadian Torrens jurisdictions that registration did not protect A from a fatal defect in the immediate transaction on which A's registration was based. This view was based at least in part on the decision of the Judicial Committee of the Privy Council in *Gibbs v. Messer* [1891] AC 248. However, since the later decision of the Judicial Committee in *Frazer v. Walker* [1967] AC 569, it has been thought that if A is a *bona fide* purchaser for value, his or her registered ownership will prevail. *Gibbs v. Messer*, on this theory, is either no longer authoritative or is restricted to its particular facts, under which a rogue forged a transfer from O to a non-existent A and then forged a further transfer from the non-existent A to the good faith purchaser, B.

The decision of the British Columbia Court of Appeal in *Credit Foncier v. Bennett* (1963) 43 WWR 546 suggests that in that province the reasoning in *Frazer v. Walker* might be accepted where B has become registered as owner of an estate in fee simple under a forged or unauthorized conveyance, but not where B has become registered as the owner of a charge. In the latter case, the statute says that B "shall be deemed" to be entitled to the interest, but the deeming is rebuttable.

At first blush, it seems wrong that the title registration system should either confer title upon or compensate a person who has failed to identify the party with whom the person is dealing and who has accepted a nullity and obtained registration of it. This is particularly so if O, the previous registered owner, has not connived at or contributed to the error. Nevertheless, the Joint Committee think that A should be entitled to receive either the interest or compensation.

Title registration is designed to facilitate transfer of interests in land. If the system requires every purchaser to conduct elaborate investigations to determine that the conveyances they receive are binding upon his or her vendor, it will tend to obstruct rather than facilitate the transfer of interests. If it requires everyone who registers an interest in land to contribute to the cost of the compensation system and then leaves an innocent registrant with neither the land nor compensation, it is unfair. Section 5.6 of the Model Act therefore makes it clear that a person who becomes registered under an invalid transaction in the belief that it was valid and without knowledge to the contrary should get either the interest or compensation.

That leaves the question: who should get the interest in land and who should get the money? As a general rule, it is better to get the interest than a necessarily uncertain claim for compensation. *Frazer v. Walker* would give the land to the purchaser, A, in every case, and the displaced registered owner, O, would get compensation. The Joint Committee think that approach is too rigid and is likely to have unfair results.

The Joint Committee's view is that it will usually be fairer and cheaper to restore O's registration and to compensate A. As the facts are likely to come to light fairly soon, O, as the displaced owner, is statistically likely to have a closer connection with the land, and to suffer loss which will be harsher, as well as greater and less easy to quantify, than will be the loss of A, as a recent acquirer of the interest. The Joint Committee therefore think that the general rule should be that the displaced registered owner is to be restored to ownership and the newly registered purchaser compensated for being displaced. Section 5.6(3) of the Model Act sets out this rule.

However, circumstances vary. In a particular case, it may be less harsh, less difficult or less expensive to return the land to the displaced registered owner. Section 5.6(4) of the Model Act therefore gives the Court the power, when it is just and equitable to do so having regard to some listed circumstances and any others relevant to the question, to confirm the unauthorized registration and award compensation to the displaced registered owner.

(iv) Revisions where there are competing registers

There is one last circumstance in which registrations may be revised. Where there are two registers for the same parcel or interest, and where in each register there are recorded or registered interests derived from the interest on which the register is based, the interests registered in one of those registers will be deprived of priority. (See Model Act section 5.8. See also the discussion under the heading "Conflicting registers" below.)

(7) Overriding interests

In theory, the register is everything, and a person who is not fraudulent and who records or registers an interest can be assured of the appropriate priority, or of the appropriate priority plus ownership, if the interest is registered, subject only to prior interests which are recorded or registered. In practice, every title registration system recognizes that the law must recognize the priority of some interests which are neither registered nor recorded.

Section 6.1 of the Model Act recognizes the following overriding interests:

(a) reservations or exceptions in the original grant of the estate in fee simple absolute from the Crown either expressly or pursuant to an act (Model Act section 6.1(a)).

This recognizes the public interest in retaining what is excepted or reserved. The Model Act, however, adopts what is essentially the Saskatchewan and Ontario position, namely, that the register, by making an express statement (e.g., "minerals included") can override the otherwise overriding exception or reservation. It will thereby make a change in the existing law of jurisdictions where the overriding effect of Crown reservations and exceptions is absolute.

(b) a tax lien in favour of a municipality.

It is not practicable to keep up to date tax information in a land registration office, so that purchasers must obtain it from the municipal authority anyway. Privately owned land is so close to universally subject to municipal taxes that purchasers will not fall into the trap of thinking that because the municipality's claim is not shown on the land register it does not exist. For these reasons, municipal tax liens should be effective without being recorded or registered.

(c) a leasehold for a term of 3 years or less if there is actual possession under the lease and the possession could be discovered through reasonable investigation.

This overriding interest runs counter to the policy of facilitating transfer, as the existence of a three-year lease may significantly derogate from rights of ownership, and the possibility of the existence of such a lease may require an investigation on the site. However, requiring short term leases to be recorded or registered would be an unconscionable burden on tenants and upon land registration offices. This is a somewhat revised version of existing overriding interests.

Some overriding interests which are listed in some existing Torrens statutes are not listed as overriding interests in the Model Act. One is public highways, which do not seem to require protection as they are protected in other ways. A second is easements, which do not appear to be entitled to any special protection. A third is powers of expropriation, which do not constitute interests in land.

Statutes other than the title registration statute may, and do, create interests in, or charges upon, land. These can result in serious derogations from the value of the register. The effect of section 6.1 of the Model Act, including its opening words and section 6.1(e), is that such interests will be enforced with priority from the time of their creation only if the statute which creates them refers to the title registration statute and expressly provides that the interest is enforceable with priority otherwise than as provided in the title registration statute. It does not seem practicable to ask a Legislature to bar itself from enacting other statutes which create interests in land which have priority without recording or registration, but it can be hoped that a Legislature will agree to make it clear when it intends to do so.

(8) Compensation

(a) Approach to compensation system

A title registration system can function without a system of compensation for persons who suffer loss from the malfunctioning of the system, and some do. However, Canadian title registration systems all have compensation systems. In the Joint Committee's view, they should continue to do so.

The first compensation systems in Australia were introduced, at least in part, to neutralize opposition to title registration based on fears that bringing land under title registration would result in many landowners losing their interests. While loss of interests on first registration is still possible in some provinces, this fear is not the driving force for Canadian compensation systems.

Nowadays, a compensation system has several functions. It achieves fairness. It provides what is in effect an insurance service. It encourages people to rely on the register. It is best, however, to think of it in terms of business efficiency.

Even the most efficient interest recording\title registration system necessarily involves some error and consequent loss. It is not practicable, if it were possible, to ensure that all documents transferring registered interests are valid, and it is not possible for a system dealing with masses of documents and entries to avoid all official error. If there were no compensation system, persons dealing with land would be likely to take expensive and time-consuming precautions to avoid losses which could, but are not likely to, occur under the system. The social cost of taking such precautions is not justifiable. It is better to accept the fact that there will be losses and to spread them over all users through a user-funded compensation system.

Compensation funds have been hedged around with limitation periods and, in some cases, procedural hurdles, and claims for compensation have been treated as adversarial matters. Certainly it is appropriate to ensure that claims are substantiated, but compensation should simply be a means of spreading inevitable losses in a businesslike way and of tidying up the inevitable wreckage and should be regarded as an inevitable cost of doing business in an efficient way.

(b) When compensation is payable

The compensation system is part of the interest recording\title registration system. It should provide compensation for loss caused by a malfunction of that system. Subject to two exceptions which are discussed below, it should not provide compensation for loss caused by anything else.

The interest recording\title registration system functions through the making of entries in registers. System malfunction may consist of the making of an unauthorized entry in a register, or it may consist of an omission to make a required entry. Compensation should therefore be payable for loss sustained through the making of an unauthorized entry or through the omission to make a required entry. That is, in effect, what section 7.1(1) of the Model Act provides.

One point should be made clear. Regulations under section 2.3(b)(iii) of the Model Act will, in effect, authorize Registrars to accept for registration documents which appear to be authenticated in ways prescribed by the regulations. Business efficiency requires that Registrars should do this, and no blame attaches to them for doing it. However, if a Registrar accepts for registration a document which apparently conforms to the regulations but is not valid, the registration of an interest based upon that document is not authorized by the Model Act.

Some existing title registration statutes, in effect, provide for compensation for loss sustained through the operation of the statute. This approach is reasonably satisfactory, but it requires comparison between the effect of the statute and the effect of the law which would obtain if the statute were not in force, which, after a century or more of title registration, is a rather artificial exercise. In addition, there is at least one case in which the approach leads to an unsatisfactory result. Loss sustained through the Registrar's failure to record a subsequent interest would not be compensable as a loss sustained through the operation of the statute, because the loss under the general law would be the same as the result under the statute and therefore could not be said to be sustained through the operation of the statute. It would, however, be a loss sustained through system malfunction and should be compensated for.

Some existing statutes provide for compensation for loss sustained through registration of another person through fraud. The Model Act does not. If a conveyance is genuine but induced by fraud, the loss is sustained when the conveyance is executed and delivered, and the interest recording\title registration system did not induce it, so that compensation should not be payable. The defrauded person's position will be no worse by reason of title registration, as the rogue could, in the absence of title registration, confer a good title until the conveyance is set aside. Indeed, it may be better, as section 5.7 of the Model Act will confer a statutory interest upon the defrauded former owner which, if recorded in time, will protect the former owner against later conveyances.

Some existing statutes provide for compensation for administrative error. Most administrative errors will result in the making or cancellation of a registration or recording without authority, or in the omission to make or cancel a registration or recording which is required, and no separate category is needed for those cases. If there are errors which do not affect entries in a register, such as advising orally or in writing as to what is against a parcel of land, the injured persons should be left to their tort remedies. The Model Act therefore does not provide for compensation for loss sustained through official error as such.

Section 5.6 of the Model Act adds a small additional category of compensation. It will be remembered that, if A is registered as the owner of an interest under what he believes to be a valid conveyance from O but is not, section 5.6 presumptively requires O to be reinstated as owner, with compensation to A. Compensation to A is an extension beyond the general compensation categories under section 7.1(1) of the Model Act, though it will be in substitution for the compensation to O in jurisdictions which recognize the *Frazer v. Walker* principle. Section 5.6 will include the case of an invalid request for cancellation of a registration.

Section 7.1(2) is a somewhat similar addition to cover a case in which a person sustains loss through relying upon an unauthorized request for cancellation of a recording.

(c) Criteria for fixing compensation

An owner who has been deprived of an interest by the operation of a title registration statute or by administrative error should be compensated for the value of the interest. An owner whose interest has been subordinated by the operation of the system or by administrative error should be compensated for the loss in value due to the subordination, which loss may of course be total. Neither should receive compensation for consequential economic loss which does not enter into the value of the land. Section 7.2 of the Model Act so provides.

Because land values tend to increase over long periods of time, and because a long period of time may elapse before a deprivation or subordination is discovered, it is likely to be unfair to determine the amount of the owner's loss as at the date of deprivation or subordination. In the Joint Committee's view, the appropriate time for the assessment of the loss is when the claimant brings the claim to the attention of the Registrar General or sues on it. The date of discovery would be a possible alternative, but the somewhat more current date is likely to be fairer, and proof of value at that date is likely to be easier and more accurate. Section 7.2 of the Model Act so provides.

Compensation should include interest at least from the date when a claim is brought to the Registrar General or the date when an action is brought to enforce it. It would be inappropriate to allow a full rate of interest from an earlier date if compensation is to be determined as of the date the claim is brought to the Registrar General or the court, but, if the prejudgment interest legislation of a jurisdiction allows for the award of a true rate of interest from the date on which general damages are suffered, it would be appropriate for the jurisdiction to award such interest from the date of the discovery of the loss to the date as of which the loss is assessed. Compensation should also include reimbursement for reasonable expenses incurred in bringing a claim to the Registrar General and for the costs of an action if one is brought. Section 7.5(2) and section 7.6(2) of the Model Act cover these subjects.

(d) Funding of compensation

Funds for the compensation system are now provided by users of the interest recording\title registration system through fees paid on registration. The original Torrens statutes contemplated the maintenance of an assurance or compensation fund, to be made up of specific fees charged on the registration of transfers and mortgages, and this is still largely the case, though sometimes a single fee is charged for both the administrative process and the assurance fund. Since payments out of assurance or compensation funds have been rare, it has become customary to take into government general revenue the money collected for the compensation system, and the existence of assurance or compensation funds, if they continue to exist at all, is largely notional.

The Joint Committee do not propose any departure from the user-pay principle. We think, however, that all registration and recording fees should include an element of contribution to the compensation system, as those who record their interests also get protection, albeit not as much protection, from the system.

The fixing of fees is left to regulation by section 2.3(a) of the Model Act.

(e) Limits on compensation

Some compensation systems impose either per loss or aggregate limits on compensation payments. For obvious reasons, governments are nervous about apparently unlimited liabilities, no matter how unlikely such liabilities are to materialize.

It is desirable that governments continue to provide compensation systems. This is a matter of important public policy. The administration of a compensation system, except for the settlement of claims, can be administered efficiently as a minor component of the recording and registration process, and the incremental cost of administration is small and does not involve the payment of commissions. The incremental cost to users of the system is also small, as all that it involves is paying a somewhat larger fee, and it avoids imposing upon users the necessity of engaging in separate title insurance transactions. Governments can efficiently provide coverage for all recording and registration transactions and can ensure that coverage is complete.

The imposition of a limit on individual claims would not be destructive of a compensation system so long as the limit is high enough to cover the great bulk of land transactions. Governments can, in the Joint Committee's view, afford to allow limits of sufficient magnitude, given that large claims are few and far between and that a government which had to pay out more than it took in in any year would be able to recoup the losses by increased fees over a period of time.

If a limit is imposed, those involved in larger transactions would have to consider whether to take whatever risk is involved in completing them without insurance, or whether to look for insurance. Large transactions, however, can bear the expense of greater precautions.

Section 2.3(f) of the Model Act will allow regulations to specify a maximum award.

(f) Procedure

A compensation system should be a business-like device for spreading among all users of the system the occasional inevitable losses. The Joint Committee therefore think that the statute should encourage the business-like disposition of claims. Section 7.5 of the Model Act provides for the bringing of claims to the Registrar General and for the settlement of those claims by agreement between the Registrar General and the claimant. No doubt, within that framework each jurisdiction will set up some procedure for dealing with claims, but it is to be hoped that procedures will be expeditious and that the compensation system will be administered with a view to settling all proper claims quickly and fairly.

Section 7.6 of the Model Act will allow a claimant to bring an action in court and recover judgment for the amount of the claim.

Section 7.7 of the Model Act provides for the payment by the Provincial Treasurer of an amount agreed to by the Registrar General or of the amount of a judgment, subject to any limitation on amount imposed by regulation. Payment should be mandatory, and financial administration legislation should recognize that principle up to any limits prescribed by regulations.

(g) Limitation period

The Torrens statutes require claims for compensation to be brought within limitation periods which commence at the time the claimant is deprived of an interest in land. This is unfair, because in many cases there is nothing to bring to the claimant's attention that the deprivation has taken place, so that the right to compensation is lost before the claimant knows of it.

The Joint Committee propose that a discovery rule apply. Accordingly, section 7.3 of the Model Act will start the time running when the claimant "knows or ought to know of the loss" and will give the claimant two years to settle with the Registrar General or commence action. Lest the approach of the time limit constrain a claimant to commence action when settlement is still possible, the section will permit the Registrar General to agree to extend the time.

H. Some Specific Matters Affecting Rights of Ownership

(1) Fraud

The general law relating to fraud as between immediate parties meshes in well enough with title registration law. There is, however, a special problem when B acquires an interest from O, the registered owner, and registers or records the interest at a time when another person , A, owns a conflicting interest which is not recorded or registered.

Facility of transfer would best be promoted by providing that B always obtains priority over A. Ethical standards and the protection of individuals against sharp or dishonest practice would best be implemented by providing that B obtains priority over A only if B does not know of the existence of A's interest. Neither extreme is acceptable. Some balance must be achieved.

The common law, or rather equity, said that a *bona fide* purchaser of the legal estate without notice took it free of equitable interests. However, a purchaser was fixed with notice, not only of the interests he knew about, but also of interests which would have been discovered by a proper investigation of title and possession. Purchasers therefore had to engage in expensive and time consuming investigations of title and possession in order to minimize the risk of finding themselves subject to interests which they did not expect to have priority over them.

Canadian title registration statutes strike a different balance. Under all of them, registration confers ownership, but not if the registered owner was guilty of fraud. Most of the Torrens-based statutes go on to exclude from the ambit of fraud some conduct which might well be equitable fraud under the general law. They abolish the doctrine of constructive notice and say that even actual knowledge is not of itself to be imputed to a purchaser as fraud. They therefore do not require a purchaser to conduct any investigation other than a search of the register (except to guard against overriding interests).

This policy is well accepted in the jurisdictions in which it applies. It is not, however, easy to determine what, in addition to mere knowledge of the existence of an unrecorded and unregistered interest, will deprive a purchaser of the protection of those statutes. The Joint Committee think that the point should be clarified.

In the view of the Joint Committee:

(a) the doctrine of constructive notice should not apply;

(b) proceeding with actual notice of an unrecorded and unregistered interest should not be, by itself, imputed as fraud;

(c) a person who knows of an existing unrecorded and unregistered interest should be entitled to assume without inquiry that the proposed purchase is authorized by the owner of the unrecorded and unregistered interest;

(d) proceeding with knowledge that a proposed acquisition is not authorized by the owner of the unrecorded and unregistered interest and that the proposed purchase will prejudice that interest should consititute fraud;

(e) the same rules should apply to a person who becomes registered without giving value for the acquired interest, but a volunteer who merely records an interest without giving value should not acquire priority over a prior interest.

Section 1.2 of the Model Act, when read with sections 4.5(2)(b)(ii) and 5.4(1)(c), gives effect to these views.

This test focusses on the point of substance, namely, whether B knows that the acquisition of interest is actually an invasion of the rights of A. It facilitates transfer. It adds some predictability. It says that B can assume that O, the owner, in granting an interest to B, is acting with A's authority. If he is, there is no reason to deny priority or ownership to B. B does not have to investigate to find out whether or not the assumption is true.

The test is probably somewhat less protective against sharp practice than is some present Torrens-based title registration law and is almost certainly less protective than are statutes which make an exception from indefeasibility for fraud without limiting the scope of the word under the Model Act. B may know that A's interest exists. B may have no reason to think that A has agreed to the transaction. Nevertheless, B, by purchasing an interest and recording or registering it, will obtain priority over A. This can be sharp practice. The justification is the need for a system of obtaining interests in land which is cheap, quick, easy and sure. Facts are often open to different interpretations, and persons acquiring interests should have clear guidance as to when they can rely on registers. The protection of the system is available to the owner of every interest, and one who does not take advantage of the protection takes the risk of loss. This is necessary for the benefit of those who do take advantage of it.

(2) Value

The general law looks more favourably on purchasers who give value for interests in land than upon volunteers or donees who do not. So do the existing interest recording and title registration statutes. Much of the protection of interest recording and title registration is available only to purchasers who have given value.

For interest recording purposes, the Model Act continues this treatment. Under section 4.5(2)(b)(i), the recording of a subsequent interest confers priority over a prior interest only if the subsequent interest was obtained for value as defined in the Model Act.

However, the Joint Committee have concluded that the protection of title registration should be given to registered owners whether or not they have given value for their interests. Volunteers who register interests will contribute to the cost of the compensation system. Volunteers who become registered as owners of interests of the kinds which can be registered are likely to spend money on land and involve it in their economic affairs and thus require assurance of ownership as much as do purchasers. The elaborate investigations required by the common law are as burdensome for volunteers as for purchasers, and the exposure to the risk of ownership being upset by someone further up the chain of title is just as harsh, once investment has been made in land. Part 5 of the Model Act, which deals with registration, therefore does not distinguish between purchasers, on the one hand, and volunteers or donees on the other.

For interest registration purposes, the Model Act therefore treats a volunteer or donee in the same way as it treats a purchaser. Section 5.3(1) declares a registered owner to be the owner of the registered interest and does not limit the declaration to a case in which the registered owner has given value. Not having given value is not a grounds for revision of registrations under section 5.4(1).

(3) Conflicting registers

(a) Need for special principle

The law cannot effectively say that each of persons A and B is the owner, to the exclusion of all others, of the same estate or interest in the same land, nor can it effectively say that each of conflicting interests A and B shall be enforced with priority over the other. It is, however, theoretically possible that two registers will be created for the same parcel or interest, that interests will be recorded and registered in each, that section 4.5 of the Model Act will declare interests recorded and registered in each to be entitled to priority over conflicting recorded and registered interests in the other, and that section 5.3(1) will declare registered owners in each to be the legal owners of conflicting registered interests.

Obviously, a Registrar will not intentionally create two parcel registers for the same parcel or two interest registers for the same interest. However, the possibility that there may be an inadvertent duplication has to be addressed, if only so that persons dealing with land will not feel impelled to conduct historical searches of title in order to assure themselves that no such duplication has occurred (though even an historical search will not give such an assurance because it necessarily starts at the end of one chain of title and might not discover the other).

Some of the Torrens-based statutes deal with the problem by making an exception from indefeasibility for, for example, a "prior certificate of title granted under this Act or granted under any law heretofore in force and relating to title to real property" (Alberta LTA s. 64 and 66) or "an instrument of title prior in date of registration under this Act, or under any law heretofore in force in any case in which 2 or more grants, or 2 or more certificates of title, or a grant and certificate of title, are registered under this Act or under any such law in respect of the same land" (Alberta LTA s. 173(1)(f)). This exception has caused much difficulty, largely because it is difficult to understand and apply.

There are two questions: (a) when should special principles relating to conflicting registers be invoked? (b) when special principles are invoked, what should they be?

(b) When special principles should apply

As we have seen, most of the Torrens-based statutes say that the special principles should be invoked when there is (a) a certificate of title, and (b) a prior certificate of title to the same land, or possibly a prior "instrument of title". This is not, in the Joint Committee's view, the appropriate test.

In the Joint Committee's view, the special principles should be invoked when, and only when, no other principle or provision of the title registration statute will solve a conflict between two conflicting interests. That situation will arise only if

(a) there are two parcel registers for the same parcel or two interest registers for the same interest (because if there is only one register the usual priority principles will determine priority), and

(b) two interests, one in each register, have come into conflict, either as to ownership or priority, with each other, and

(c) at least one interest has been derived without fraud from each of the originally conflicting interests.

The reasons for requirement (c) are:

(a) that at the time of the first conflict between interests in the two registers, one of the interests is entitled to priority over the other, so that it is not then necessary to apply the special principles;

(b) that if a person acquired an interest without fraud from either of the conflicting interests, the general principles reflected in section 5.5 of the Model Act would give priority to the interest so acquired and any successors to that interest, so that there is no need for the special principles so long as this has happened with respect to only one of the originally conflicting interests; and

(c) that it is only if two interests derived from the originally conflicting interests conflict with each other that the special principles are needed.

Section 5.8 of the Model Act accordingly provides for the application of special principles in cases in which there are conflicting interests, each of which is derived from a "root registered interest", recorded or registered in two different registers, that is, under two different chains of title. Annotations to the section show by examples how to determine when this situation has arisen.

(c) What special principles should apply

The next question is: what special principles should be applied to resolve a conflict of the kind just described? It does not appear to the Joint Committee that the relative dates of registers, which are fortuitous insofar as the merits of the parties are concerned, should be the governing factor. Nor does it appear to the Joint Committee that the identification of the best original root of title should dictate the answer, as that is also fortuitous (though if all else fails, it will be the only possible answer).

The Joint Committee are of the view that a rational solution would be to resolve the conflict in favour of the chain of title under which a party is in possession or has dealt with a party in possession. The law has long given protection to possession. The land is more likely to have special value to the party in possession. It is likely to be cheaper to pay off a party who is not in possession.

The test of possession will not resolve the conflict if no one is in possession under either of the conflicting chains of title. The Joint Committee are of the view that in that event, if there is only one party who gave value or who claims through a person who gave value, it would be rational to award the interest to that party. While the Model Act attaches less importance to value than does the existing law, the giving of value is a reasonable grounds for giving a preference if there is no stronger grounds. Of course, if someone in each chain gave value, or if no one in either chain gave value, this test will not resolve the conflict, either.

In the last analysis, if there is no other reason for preferring one chain of title over the other on grounds of possession or value, it is necessary to go back to the original root of the conflict and see which chain of title has the better legal origin, and resolve the conflict in favour of that chain. That result may be virtually fortuitous, but there is no better solution available.

Section 5.8(4) of the Model Act lays down the special principles in the form of rules. The annotation to section 5.8(4) illustrates the application of the principles by examples.

The losers will be entitled to compensation.

(4) Misdescription

Most of the existing Torrens-based statutes except from the indefeasibility of a registered title land included by wrong description or misdescription. The Model Act does not.

If two registers or registrations cover the same land, the problem can and should be sorted out under the general principles of title registration, whether the problem has arisen because of misdescription or for some other reason. If the problem exists within one register, it will be resolved on priority principles. If two registers cover the same land, the problem will be resolved on conflicting registers principles.

(5) Limitation of actions

The Model Act does not prescribe any limitation period for the revision of registrations. In the absence of such a prescription, it seems likely that a revision of registrations can be made at any time, and the courts have allowed revisions of land registration office records without any time limitation. However, the question whether or not time limits should be imposed is one for a limitations system.

I. Conclusion

It is the view of the Joint Committee that the interest recording\title registration system we have described in this Report and in the Model Act is a rationalized and modernized system which will preserve the benefits of present systems and will make them more efficient to operate and more useful to their users.

The Joint Committee therefore respectfully tender the Model Act as an appropriate foundation for legislation in the provinces and territories of Canada.

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PART III. MODEL LAND RECORDING AND REGISTRATION ACT

PART 1

INTERPRETATION, APPLICATION AND PURPOSES

[Section 1.1 - Definitions]

1.1 In this Act,

(a) "Court" means the [*superior court of unlimited trial jurisdiction of the enacting jurisdiction*];

(b) "cancellation" means the administrative process which, under this Act, eliminates the prospective effects of recording and registration by means of entries in a register;

(c) "claimant" means either

(i) the person who records an interest, or

(ii) if there has been a registered assignment of the right to have a recording cancelled, the registered assignee of the right.

(d) "document" means a writing, a plan, a map, or any information in a form which can be converted into a writing, a plan, or a map by a machine or a device, and includes information

(i) on microfilm,

(ii) in electronic, mechanical or magnetic storage, or

(iii) in electronic data transmission signals;

(e) "interest" means any estate or right in, over or under land recognized under law;

(f) "law" means the law in force in [*enacting jurisdiction*] and includes

(i) legislative enactments,

(ii) common law and equity, and

(iii) regulations;

(g) "lien" means an interest created by operation of law which secures the payment or other performance of an obligation;

(h) "person", "claimant" and "owner" include any agent who is empowered to act for the person, claimant or owner;

(i) "postponement" means either

(i) the process of subordinating the enforcement of one interest to another, or

(ii) the document effecting a postponement;

(j) "recording" means the administrative process which, under this Act, secures priority of enforcement for an interest by means of entries in a register;

(k) "register" means the register established under this Act

(i) for a parcel of land, or

(ii) for a registered interest

and includes any document incorporated into a register by reference;

(l) "registration" means the administrative process which, under this Act, affects, confers, confirms or terminates interests by means of entries in a register;

(m) "security interest" means a consensual interest which secures the payment or other performance of an obligation;

(n) "servitude" means an interest affecting the use or enjoyment of land created by covenant, condition, easement or implication, and includes a utility interest, but does not include a lien or a security interest;

(o) "successor" means a person who acquires an interest, or an interest derived from that interest, directly or through intermediate transactions, from a prior owner;

(p) "tax lien" means a lien against an interest of a taxpayer for the amount of unpaid taxes, fees, assessments, rates and other charges;

(q) "termination" means either

(i) the process of releasing or discharging an interest, or

(ii) the document effecting a termination;

(r) "this Act" includes any regulations made under this Act;

(s) "transaction" means an event or a dealing affecting an interest, whether by means of a contract, transfer, transmission, postponement or termination, or by any other means;

(t) "transfer" means either

(i) the process of creating or assigning an interest, or

(ii) the document effecting a transfer,

other than by will or by operation of law;

(u) "transmission" means the process of creating or passing an interest by operation of law, and includes the passing of an interest

- **(i) under a limitations act, or**
- **(ii) to a personal representative;**

(v) "utility interest" means [*here insert definition used in enacting jurisdiction*];

(w) "value" means any consideration sufficient to support a simple contract, and includes

- **(i) a commitment to give credit or for the extension of time for payment under credit previously given,**
- **(ii) the acceptance of a security interest for, or in total or partial satisfaction of, an existing claim, or**
- **(iii) consideration previously given for an existing contract;**

(x) "writing" includes printing, typewriting, or any other intentional reduction of language into legible form, or to a form which can be converted into legible form by a machine or a device, such as language

- **(i) on microfilm,**
- **(ii) in electronic, mechanical or magnetic storage, or**
- **(iii) in electronic data transmission signals;**

Annotation

Section 1.1(b)

Under section 5.4(2), cancellation of a registration divests the interest and cancels the recording of the interest. Under section 4.7(2) and section 4.7(3), cancellation of a recording does not terminate the interest and does not affect accrued priorities of enforcement rights.

Section 1.1(e)

The Model Act provides for the recording and registration of interests. Section 1.1(e) makes it clear that it is the general law and not the Model Act which determines what is an interest and what its incidents are.

Section 1.1(j)

"Recording" takes place when the Registrar enters the identifier for a document in the register (section 4.3(2)). The entry of the identifier incorporates the document into the register by reference (3.2(3). The interest conferred or summarized by the document is thus recorded (section 4.2(1)). Section 4.5 defines the priority which is conferred on the interest, or which is confirmed, and the circumstances under which priority is conferred.

Section 1.1(l)

"Registration" takes place when the Registrar enters an interest in the register (section 5.2(1). Except in the case of a transfer of an estate in fee simple absolute, the entry of the identifier for the document effecting the transaction which creates or confers the registered interest will incorporate the document into the register (section 4.3(2)). Sections 5.2 and 5.3, subject to the limitations set out in them, confirm or confer ownership of the registered interest.

[Section 1.2 - Fraud]

1.2

(1) In this Act the meaning of fraud is subject to the provisions of this section.

(2) The equitable doctrine variously known as "notice" and "constructive notice" is abolished for the purpose of determining if conduct is fraudulent under this Act.

(3) A person who engages in a transaction with an owner who holds an interest subject to an interest which is neither recorded nor registered,

- **(a) is not affected by actual knowledge of the interest which is neither recorded nor registered,**
- **(b) may assume without inquiry that the transaction**
  - **(i) is authorized by the owner of the interest which is neither recorded nor registered, and**
  - **(ii) will not prejudice that interest, and**
- **(c) has no duty to assure the proper application of any assets paid or delivered to the owner.**

(4) The person referred to in subsection (3) obtains the interest acquired under the transaction through his fraud if he had actual knowledge that the transaction

- **(a) was not authorized by the owner of the interest which was neither recorded nor registered, and**
- **(b) will prejudice that interest.**

Annotation

Section 1.2

Section 1.2 does not affect the nature of fraud as between two immediate parties, that is, as between O, a registered owner, and B, who, by fraud, induces O to convey the registered interest to B. What it does affect is the meaning of fraud as between B and A, who at the time of a conveyance from O to B and the resulting recording or registration of B's interest, is the owner of a prior conflicting unrecorded and unregistered interest. If B acts fraudulently, a recording of his interest under section 4.5(2)(b) will not give him priority over A, and a registration of his interest will be subject to revision, i.e., in this example, to cancellation, under section 5.4(1)(c).

Section 1.2(2) continues the abolition of the doctrine of constructive notice which appears in the existing Torrens-based statutes, so that much of what is called equitable fraud is not included in the term in the Model Act. It ensures that fraud will not be imputed to B merely because B knows of the existence of A's prior interest.

Most of the Torrens-based statutes provide that mere knowledge of the existence of A's interest is not to be imputed to B as fraud. Section 1.2(3)(a) says much the same thing. These statutes do not say what it is, in addition to knowledge, will make B's conduct fraudulent. Section 1.2(3) and (4) do that. The test is whether or not B has actual knowledge that A has not authorized O to grant the conflicting interest to B. Proceeding with that knowledge is fraudulent. However, in the absence of actual knowledge to the contrary, B may assume that A is acting with O's authority in conveying the conflicting interest.

[Section 1.3 - Application to Crown]

1.3

(1) The Crown in right of [*enacting jurisdiction*] is bound by this Act.

(2) This Act applies to any interest vested in the Crown in any other right which is within the legislative competence of the Legislature, and to any interest which has been subjected to this Act by the Crown.

Annotation

Section 1.3

1. The general policy of the Model Act is that the Crown, in the right of the enacting jurisdiction, Canada, or any other jurisdiction, is to be treated as nearly as possible like the owner or acquirer of any interest in land.

2. There is an exception. Under section 6.1(a), a reservation or exception from a Crown grant is an overriding interest unless the interest has been expressly registered.

[Section 1.4 - General application]

1.4

This Act applies to

(a) every parcel of land, and every interest therein, for which a certificate of title has been issued under a predecessor Act, and

(b) every parcel of land, and every interest therein, for which a register is established under this Act.

Annotation

Section 1.4

Under section 1.4(b), the mere establishment of a register for a parcel would bring the parcel under the act. Existing statutes contain elaborate procedural provisions for bringing land under them. These provisions could be carried forward in the new statute or put into regulations under section 2.3(d).

[Section 1.5 - Purposes]

1.5
(1) The purposes of this Act are

(a) to provide certainty for ownership of interests in land and to simplify proof of ownership,

(b) to facilitate the economic and efficient execution of transactions with respect to interests in land, and

(c) to provide compensation for persons who sustain loss through entries in registers which are not authorized by this Act.

(2) In order to carry out the purposes mentioned in subsection (1)(a) and (b), the Act provides for

(a) the establishment of registers for

(i) parcels of land, and,

(ii) where convenient, for registered interests,

(b) establishing the relative priority of enforcement of interests in land through recording, and

(c) establishing the ownership of interests in land by registration.

(3) In order to carry out the purpose mentioned in subsection 1(1)(c), the Act provides for compensation under Part 7.

Annotation

Section 1.5

Section 1.5(1) is intended assist in the interpretation of the act and to focus the mind of the reader upon the objects of a title registration system. Section 1.5(2) and (3) list the principal devices used to achieve those objects.

PART 2

GENERAL

[Section 2.1 - Registration districts and offices]

2.1

(1) The Lieutenant Governor in Council

(a) shall establish one or more land registration districts in the Province,

(b) may establish new land registration districts, and

(c) may change the boundaries of established land registration districts,

as may be required to achieve the purposes of this Act.

(2) The Lieutenant Governor in Council

(a) shall establish a land registration office in each land registration district, and

(b) shall provide each office with supplies and equipment as may be required to achieve the purposes of this Act.

Annotation

Section 2.1

Section 2.1 imposes a duty upon the Lieutenant Governor in Council to establish one or more land registration districts, each with a land registration office. However, it leaves the Lieutenant Governor in Council to determine, as administrative matters, the numbers of land registration districts and the areas to be administered by each.

[Section 2.2 - Public officers and employees]

2.2

(1) The [*minister charged with the administration of the Act*] shall appoint a public officer called the "Registrar General".

(2) The Registrar General shall,

- **(a) direct and supervise the operation of the land registration offices,**
- **(b) direct and supervise all persons employed in the land registration offices in the performance of duties and the exercise of powers prescribed under this Act, and**
- **(c) inspect the records of the land registration offices.**

(3) The Registrar General may perform the duties and exercise the powers of a Registrar.

(4) For each land registration office, a Registrar, one or more Deputy Registrars, and any other employees required for the operation of the office, may be appointed in accordance with the [*act governing the public service in the enacting jurisdiction*].

(5) For each land registration office, the Registrar shall perform the duties and exercise the powers prescribed by this Act, but a duty performed or a power exercised by a [*list of officials so authorized*] is deemed to be performed or exercised by the Registrar.

(6) No person shall be appointed Registrar General or a Registrar unless he is a barrister and solicitor of at least three years' standing of one of the provinces of Canada.

(7) The Registrar General, the Registrars and all other employees of land registration offices shall be attached to the [*department of the minister charged with the administration of the Act*] and subject to the direction

and supervision of the [*minister charged with the administration of the Act*].

(8) Neither a public officer, nor any employee acting for him or appointed to act in his office, shall be liable for any acts or omissions, done or not done, in good faith.

Annotation

Section 2.2(1)

Section 2.2(1) requires the responsible minister to appoint a Registrar General, who is to supervise the land registration offices created under section 2.1, and who may act as a Registrar.

Section 2.2(2)

Section 2.2(2) effectively requires the responsible minister to appoint a Registrar for each land registration office, though the Registrar General may act as a Registrar. Under later sections, a Registrar is responsible for establishing registers and maintaining them according to the Act and is therefore responsible for the operation of the land registration office.

[Section 2.3 - Regulations]

2.3 The Lieutenant Governor in Council may make any regulations required to achieve the purposes of this Act, including regulations

(a) requiring the payment of a fee, prescribing the amount of the fee and permitting a payment to be made under credit arrangements, with respect to any action a Registrar is required or authorized to take by this Act;

(b) prescribing requirements, [*notwithstanding the Interpretation Act*],

(i) as to the form of documents or classes of documents submitted for recording or registration to facilitate their efficient processing in a land registration office,

(ii) as to the form and content of documents submitted for registration to facilitate comprehension of their legal effect, and

(iii) for verifying the authenticity of documents submitted to obtain the revision of registrations or cancellation of recordings;

(c) prescribing requirements with respect to addresses of persons and notices a Registrar is required to give under this Act;

(d) prescribing requirements with respect to

(i) the establishment of a register for a parcel of land which was not previously subject to this Act, and,

(ii) subject to Part 3, with respect to the establishment, cancellation and form of parcel and interest registers.;

(e) prescribing requirements as to legal descriptions of parcels and as to the preparation, form, approval and use of plans of survey;

(f) prescribing a maximum amount or amounts payable for compensation under Part 7; and

(g) for the use of the International System of Units as defined in the Weights and Measures Act (Canada) in any register or document incorporated therein.

Annotation

Section 2.3(a)

Regulations under section 2.3(a) will require payment of fees for official actions of Registrars and Registrars' staffs. The fees can include a contribution towards the compensation system established by Part 7. A Registrar can decline to perform any duty if the prescribed fee is not paid.

Section 2.3(b)

Regulations under section 2.3(b)(i) will deal only with form. Their only purpose will be efficiency of administration. They will deal with such things as size and format of documents and the orderly presentation of required information. These are the only requirements applicable to documents submitted for recording.

Regulations under section 2.3(b)(ii) and (iii) will deal only with documents submitted for the purpose of effecting registrations and cancellations of registrations. They can prescribe forms and content, as the existing statutes or regulations under them now do, though they should not impose strait-jackets upon legitimate transactions. They can also prescribe the methods of authentication, such as witness's signatures and affidavits, though they should not set up prophylactic systems which impose greater costs on users of the system than is justified by the risk of accepting unauthorized documents and the likelihood that the formalities will avoid loss.

Section 2.3(d)

Existing interest recording\title registration statutes customarily include elaborate procedural provisions for bringing land under them. Procedures are best dealt with by regulations. Regulations made under section 2.3(d) can deal with them.

Regulations under section 2.3(d) will also deal with other matters relating to registers generally. These will include the form of registers, including computerization, as section 2.4(1) merely provides that registers shall be maintained in writing, and the definition of "writing" in section 1.1(x) is broad enough to include computer records (see the annotation to section 2.4). Regulations under section 2.3(d) could also regulate the discretions of Registrars with respect to the geographic area or substance which can be covered by one register, and with respect to the establishment of interest registers and consolidated interest registers, as sections 3.1 and 3.2 leave these matters to official discretion.

Section 2.3(e)

Regulations under section 2.3(e) should provide a system of land descriptions based upon survey plans which will permit the efficient identification on the ground of parcels covered by registers. These regulations would replace many existing statutory administrative provisions for survey plans, which would be better in regulations.

Section 2.3(f)

Part 7 establishes a system of compensation for those who suffer loss through unauthorized recordings and registrations or through failure to make required recordings and registrations. It contemplates that, as a condition of maintaining such a system, a government may wish to limit its liability in any particular case. Regulations under section 2.3(f) could do this.

[Section 2.4 - Records and copies]

2.4

(1) Registers and any other documents required to be prepared or kept under this Act shall be maintained in writing.

(2) Any person who has paid the prescribed fee shall be furnished with a copy, or a certified copy, in legible written form, of any register or document incorporated therein.

(3) The certification with respect to a certified copy of a register or of a document incorporated therein shall be signed by a Registrar.

(4) A certified copy referred to in subsection (3) is admissible in evidence in any civil, criminal or administrative proceeding to the same extent as the original would have been admissible, and is conclusive proof of the facts certified without proof of the signature or official capacity of the person who appears to have signed the certification.

Annotation

Section 2.4(1)

Section 2.4(1) requires that registers and documents be maintained in writing. However, "writing", under section 1.1(x), includes not only printing but language which is microfilmed or which is in electronic storage or in electronic data transmission signals. It therefore permits computerization, though it does not require it. It will be amplified by regulations under section 2.3(d).

Section 2.4

Section 2.4(2) ensures that the public has access to all information in registers and in recorded and registered documents.

[Section 2.5 - Alteration of documents]

2.5 A Registrar may alter any document submitted under this Act

(a) before the document is recorded or registered, and

(b) with the written consent of the parties who, in the opinion of the Registrar, will be affected by the alteration.

Annotation

Section 2.5

Section 2.5 enables a Registrar to correct a document before recording or registration, if all persons affected consent. This is for the administrative convenience of users.

PART 3

REGISTERS

[Section 3.1 - Establishment of registers]

3.1

(1) A Registrar shall establish parcel registers for all land within each land registration district which is subject to this Act.

(2) Subject to the [*statute regulating the subdivision of land*], a parcel may include any geographic area or substance therein which can be owned in fee simple absolute, whether on, over or under the surface of land, which the Registrar deems convenient at any time for the purposes of this Act.

(3) A Registrar may, when convenient at any time for the purposes of this Act, establish an interest register for any registered interest.

(4) One consolidated interest register may be established for two or more interests, when convenient at any time for the purposes of this Act, if the interests are owned by the same registered owner, and are

(a) related in purpose, or

(b) substantially the same under law.

(5) The Registrar shall assign an identifier to each register.

NOTE: A jurisdiction which is required to register grants from the Crown of less than fee simple estates may wish to revise Section 3.1(1) and section 3.1(2) accordingly.

Annotation

Section 3.1

1. The parcel register will perform the functions which a certificate of title now performs in some jurisdictions. There will be no duplicate certificate of title or duplicate register.

2. The Registrar is required by section 3.1(1) to establish parcel registers which will in the aggregate cover all land to which the statute applies, but can determine what land is to be included in each parcel register. Regulations could be promulgated under section 2.3 to give guidance to Registrars.

3. A register is a formal record of information. Registers were originally in book form. Some land registration registers are now in single sheet form. Some are now in electronic form in computers.

4. A parcel register is a formal record of information about the ownership of a parcel of land. The Model Act does not prescribe its form, other than to say that it must contain the information listed in section 3.2 and any additional information prescribed by regulation under section 2.3(e).

5. Section 3.1(2) allows a Registrar, subject to the regulations, to establish a parcel register which does not cover a geographical area with all the rights above and below the surface which an estate in fee simple can include. Suppose that O, the registered owner of Blackacre, transfers to A an estate in fee simple in the mines and minerals. If the general law recognizes an estate in fee simple in mines and minerals, the Registrar may establish a parcel register for A's estate in fee simple and delete the mines and minerals from the register which previously covered all of Blackacre. Suppose that, in addition, O transfers to B a volumetric space above the surface of Blackacre. If the general law recognizes an estate in fee simple in such volumetric spaces, the Register may establish another parcel register for the volumetric space so conveyed and delete it from the register covering O's remaining estate in fee simple.

6. Section 3.1(3) allows the Registrar to open a register based upon an interest which is less than an estate in fee simple but is of another kind which is registrable under section 5.1. Suppose that O, the owner of Blackare in fee simple, grants a utility right of way to A, a power company, which mortgages it to B, along with its other properties, to secure a multi-million dollar financing. If there is no interest register, B's security interest must be registered in the parcel register, where it may, at first blush, appear to affect O's ownership and any other interests recorded or registered against the parcel. If an interest register is

established for A's utility interest, B's security interest will be registered in it and not in the parcel register at all.

7. Section 3.1(4) allows a consolidated interest register to be established for a group of similar interests. If O1 to O50 have granted utility interests to A for one pipeline or power line, one register can be established for the 50 utility interests. Issuing and looking after one interest register instead of 50 will save administrative cost both in the land registration office and in A's office. Then, when A mortgages the whole power line and associated utility interests to B, the mortgage can be registered through one entry instead of 50. There being no reason in principle why several interests cannot be included in one register, the test for determining whether B's interests are sufficiently similar is not restrictive: the decision whether to establish a consolidated utility register is really a practical one to be made by the Registrar.

[Section 3.2 - Content of registers]

3.2
(1) A parcel register shall contain

(a) the identifier for the register,

(b) a legal description of the parcel,

(c) the name of the registered owner of the fee simple absolute in the parcel,

(d) either

(i) the identifier for any document of transfer, transmission, postponement or termination registering an interest in the parcel and the name of the registered owner of the interest, or

(ii) if an interest register has been established for any registered interest in the parcel, the identifier for that register,

(e) the identifier for any document creating a registered servitude the benefit of which is annexed to the parcel, and the identifier for the register for the parcel which is subject to the servitude, and

(f) the identifier for any document recording an interest in the parcel which has not been registered.

(2) An interest register shall contain

(a) the identifier for the register,

(b) the identifier for the register for any parcel subject to the interest for which the register is established,

(c) the identifier for any document of transfer or transmission registering the interest for which the register is established and the name of the registered owner of the interest,

(d) either

(i) the identifier for any document of transfer, transmission, postponement or termination registering an interest against the interest for which the register is established and the name of the registered owner of the interest, or

(ii) if an interest register has been established for any registered interest derived from the interest, the identifier for that register, and

(e) the identifier for any document recording an interest in the interest for which the register is established, which has not been registered.

(3) An identifier shall be assigned to each document referred to in this section, and the entry of the identifier for a document in a register in accordance with this section incorporates that document into the register by reference.

(4) An entry in a register forms part of the register whether or not it was made under proper authority.

Annotation

Section 3.2(1)

1. Section 3.2(1) prescribes the information which a parcel register must contain.

A parcel register must in every case contain a description of the parcel of land for which it is established and the name of the registered owner of the estate in fee simple absolute in the parcel. The effect of section 5.3(1) is that, the registered owner so named, if legally capable of owning it, is the legal owner of the estate in fee simple absolute.

In the case of a lesser interest which is of a kind listed in section 5.1, the entry registering it in a parcel register must (unless a separate interest register is established for the interest) contain two things. The first is the identifier for the document which registered the interest. The second is the name of the registered owner of the interest. The effect of section 5.3(1) is that if the interest is of a kind listed in section 5.1 and is recognized by law, the registered owner so named, if legally capable of owning it, is the legal owner of the interest.

2. Under section 3.2(3), the entry in a parcel register of the identifier for a document registering an interest which is less than an estate in fee simple absolute incorporates the document into the register. This is necessary, because it is the document, together with the general law, which defines the interest which is registered. It is not necessary either to enter the identifier of a document registering an estate in fee simple absolute or to incorporate the document into the register, because the general law defines an estate in fee simple absolute and because it is therefore not necessary to refer to the document to ascertain the rights of the registered owner.

3. A parcel register must also contain the identifier for any document which records an unregistered interest in the parcel. Under section 3.1(3), the entry of the identifier incorporates the document. Under section 4.2, the recording of the document records any interest which is based on the document or on a transaction summarized in the document, and section 4.5 provides for the consequences of the recording in terms of priority of the interest.

4. Finally, if the parcel for which a parcel register is established includes the benefit of a servitude (which, under section 1.1(n)) includes a restrictive covenant, easement and a utility interest), the parcel register must include the identifier for the document creating the servitude and also the identifier for the parcel register for the parcel which is subject to the servitude.

Section 3.2(2)

Section 3.2(2) prescribes the information which an interest register established for an interest less than an estate in fee simple absolute, such as a mortgage, lease or utility interest, must contain.

An interest register must contain both the identifier of the parcel register for any parcel subject to the interest and the identifier for the document registering the interest for which the register is created. Entering the identifier incorporates the document, and the consequences are the same as the consequences of the registration of a registrable interest in a parcel register. Interests are then registered and recorded against the interest in the interest register in the same way as lesser interests are registered and recorded in parcel registers, and the same consequences flow.

Section 3.2(3)

The effect of section 3.2(3) is that a register includes not only what is usually called the register, that is, the formal written record which contains the information required by section 3.2(1) and section 3.2(2), but also the documents whose identifiers appear in that formal record. The documents must therefore be examined in order to determine what the interests are which are recorded and registered.

Section 3.2(4)

An entry in a register is part of the register. If it proves to have been made without authority, whether by a Registrar or by someone else, it may be possible to cancel it or to cancel its effect under other provisions of the Act, but while it is there it has whatever effect the Act gives to an entry. This is necessary to promote facility of transfer.

PART 4

RECORDING

[Section 4.1 - Recordable interests]

4.1 Any interest may be recorded if it is in land which is subject to this Act, and any recording which is not authorized under this section is void.

Annotation

Section 4.1

1. Section 4.1 lays down two general principles. One is that all interests in land recognized by the general law, including estates and other kinds of rights, are capable of being recorded. The second is that nothing but an interest in land recognized by the general law is capable of being recorded, and that a purported recording of something else, such as a mere personal contract right, is not a recording at all and does not have the consequences of a recording under the Act.

2. "Recording" is defined by section 1.1(j) to mean "the administrative process which, under this Act, secures priority of enforcement for an interest by means of entries in a register". Section 4.3(2) provides that an interest is recorded when the identifier of a document submitted for recording is entered in the appropriate register.

3. "Interest" is defined by section 1.1(e) to mean "any estate or right in, over or under land recognized by law", and "law is defined by section 1.1(f) to mean the law in force, including legislative enactments, common law and equity, and regulations.

[Section 4.2 - Recording requirements]

4.2

(1) An interest may be recorded by means of a document in prescribed form which

(a) incorporates the document on which the interest is based or a copy thereof, or

(b) summarizes the transaction on which it is based.

(2) An interest may be recorded notwithstanding the failure of the transaction on which it is based to comply with formalities.

(3) An interest may be recorded by any person, whether or not the person is an owner of all or any share of the interest, including, but not limited to, a person who is a successor from a prior owner of the interest to be recorded.

(4) A Registrar shall record a document submitted for recording if

(a) the interest is qualified for recording under section 4.1, and

(b) the document complies with any regulations made under section 2.3.

Annotation

Section 4.2(1)

An interest being intangible, it must, under section 4.2(1),be recorded by means of a document, which must be brought to a Registrar for the purpose of recording.

A person who wishes to record an interest may submit for recording a document which incorporates the document which has conferred the interest, a lease, for example, or a copy of that document. Alternatively, the claimant may submit a document summarizing the interest, i.e., a statement prepared by the claimant which describes in summary form the transaction from which the interest arose. In the case of a lease, the summary would say that O, the registered owner of Blackacre, has granted a lease to A, the person who is recording the leasehold interest, and would summarize the terms of the lease insofar as they affect the leasehold interest, including such things as options to renew the lease or purchase the land. This would be enough to alert anyone who deals with the land later to the existence and nature of the recorded interest.

Under section 4.5(4), the recording of a prior interest is effective only as to the rights expressly described in the recorded document. There is therefore a risk involved in recording an interest by means of a document summarizing the interest. See the annotation to that subsection.

Section 4.2(2)

An interest in land may exist although it was not conferred in proper form. An example is an agreement to sell land which does not comply with the Statute of Frauds but is enforceable under the doctrine of part performance. Such an interest may be recorded by means of a document summarizing the interest. Section 4.2(2) makes it clear that a mere failure of the underlying transaction to conform to formal requirements will not render a recording of the interest invalid.

Section 4.2(3)

Section 4.2(3) will enable a person who has acquired a derivative interest to be assured of the benefits of recording even though the interest from which the interest was derived is not recorded or registered.

Suppose that O, the owner of Blackacre, enters into a sale agreement with A1, who does not record or register the interest conferred by the agreement, and that A1 enters into an agreement to lease to A2. Under section 4.2(3), A2 can record both A1's interest and A2's interest. If A2 does so, and O later transfers Blackacre to B, who becomes the registered owner, A1's interest, as well as A2's interest, will be effective against O under section 4.5(2)(a), and the foundation of A2's interest will be secure, so long as it is recognized by the general law.

Section 4.2(4)

Section 4.2(4) makes the recording of an interest in land a matter of right by providing that the Registrar must record a document if it meets administrative regulations. (Also, the fee required to be paid by regulations under section 2.3(a) must be paid.) The only requirement about the substance of the recording is that the interest being recorded must qualify under section 4.1, that is, that it must be an interest in land.

[Section 4.3 - Time of recording]

4.3

(1) A Registrar shall record documents, insofar as practicable,

(a) promptly after their submission for recording, and

(b) in the order in which they were submitted for recording.

(2) An interest is recorded when the identifier assigned to the document submitted for recording is entered in the appropriate register in accordance with section 3.2.

Annotation

Section 4.3(1)

In an ideal world, documents submitted for recording would be recorded immediately and in the precise order in which the Registrar receives them. In practise, administrative processes take time and documents come from different sources, including mail, and go through different administrative processes, so that it is not always possible to ensure that they are recorded in the order in which they first come into the hands of land registration office staff. Section 4.3(1) enunciates the principles of immediate and sequential recording, but recognizes that there are practical limitations upon the application of those principles.

4.3(2)

The essential element of recording is the entry of a document's identifier in a parcel or interest register. Under section 3.2(3), the entry of the identifier incorporates the document into the register.

[Section 4.4 - Recording in initial register]

4.4.

(1) A Registrar may adopt a system using

- *(a) the identifiers assigned to documents submitted for recording to establish the order in which they were submitted, and*
- *(b) an initial register in which to record the identifiers assigned to documents submitted for recording and the identifiers for the registers in which the documents are to be recorded or registered in accordance with section 3.2.*

(2) If a system as set forth in subsection (1) is adopted, for the purposes of this Act, an interest is recorded when the identifier assigned to the document submitted for recording is entered in the initial register.

(3) When the identifier for any document submitted for recording has been entered in the appropriate register in accordance with section 3.2 or section 5.2, the entry for that document in the initial register may be cancelled.

NOTE: Section 4.4 is optional. It is intended to provide for interim recording in an initial register while administrative procedures leading to entry in a parcel or interest register are carried out.

Annotation

Section 4.4(1)

Recording and registration are administrative processes which necessarily take time. The use of computers may reduce the time taken, but is not likely to eliminate it.

In some jurisdictions, land registration office staff enter the identifiers of documents in interim records almost immediately upon receipt. In British Columbia, the Property Index serves this purpose under a paper system and a separate part of the register serves it under an electronic system. Other interim records are less formal. The appearance of an identifier in the interim record is accepted by conveyancers as establishing the document's relative priority, so that they can pay out purchase or mortgage proceeds on the strength of it.

Section 4.4 provides a legal foundation for a system of interim recording. Section 4.4(1) authorizes a Registrar to maintain an initial register. Section 4.4(2) provides that the entry of a document's identifier in the initial register records the document. Section 4.4(3) provides for the purging of the initial register when the document has been entered in the permanent register, where it will maintain its initial priority. If such a system is adopted, registration will be preceded by recording in the initial register.

[Section 4.5 - Priority of interests]

4.5

(1) Subject to subsection (2),

- **(a) an interest is effective from the time of the transaction upon which it is based according to law, and**
- **(b) interests shall be enforced with priority relative to each other according to law.**

(2) Subject to section 6.1,

- **(a) a prior interest which was recorded at the time that a subsequent conflicting interest was either**
  - **(i) obtained, or**
  - **(ii) recorded**

  shall be enforced with priority over the subsequent interest, and
- **(b) a prior interest is not effective against a subsequent conflicting interest which was**
  - **(i) obtained for value,**
  - **(ii) obtained without fraud of the owner of the subsequent interest,**
  - **(iii) obtained at a time when the prior interest was not recorded, and**
  - **(iv) recorded at a time when the prior interest was not recorded, and**

  the subsequent interest shall be enforced with priority over the prior interest.

(3) Under subsection (2)

(a) the recording of an interest entitles a successor to the owner of the recorded interest to have his interest enforced with the same priority, without further recording, as the recorded interest, but

(b) the recording provisions of subsection (2) are applicable to conflicting transactions between successors to the owner of the recorded interest.

(4) Under subsection (2)(a), the recording of a prior interest by means of a document summarizing the transaction on which it is based is effective only as to those rights expressly described in the recorded document, and only to the extent of the description of each right.

(5) Under subsection (2)(b)

(a) what would have been a subsequently obtained interest, but for a conflicting prior interest, becomes a fully effective interest when the prior interest becomes ineffective to the extent of the conflict, and

(b) if a subsequent interest has not become fully effective for an owner because the requirements of subsection (2)(b) were not satisfied, an interest of a successor to the owner of the subsequent interest will become fully effective when the requirements of subsection (2)(b) are first satisfied, and

(c) once a subsequent interest becomes a fully effective interest, it remains so when acquired by a successor.

Annotation

Section 4.5(1)

Section 4.5(1) makes it clear that the general law of real property, including the general law relating to the recognition and priority of interests in land, applies except when it is displaced by the the recording and registration of interests. In so doing, the subsection is consistent with the existing law of jurisdictions having similar systems, but departs from the original Torrens system theory.

If O, the registered owner of Blackacre, grants an interest in Blackacre to A, the interest takes immediate effect as if the Act did not exist. If O then purports to grant a conflicting interest to B, neither interest being recorded or registered, the existence and relative priority of the interests are determined by the common law and equity.

Section 4.5(2)

1. Section 4.5(2)(a) provides that a prior interest which is recorded at a time when a subsequent interest is either obtained or recorded is to be enforced with priority over the subsequent interest. It thus confirms the priority conferred by the common law.

   Section 4.5(2)(b) confers priority upon a subsequent interest which is obtained and recorded at a time when a prior interest is not recorded, but only if it is obtained for value and without fraud. (For a discussion of what constitutes fraud for this purpose, see section 1.2 of the Model Act and the annotations to that section.)

   The following examples will illustrate the workings of section 4.5(2):

   Example 1

   O, the owner of Blackacre, has granted an interest in Blackacre to A and has later granted a conflicting interest in Blackacre to B. A's interest is recorded. While the recording remains uncancelled, B obtains an interest and records it. A's interest will be enforced with priority because it was recorded both when B's interest was obtained and when it was recorded. (See section 4.5(2)(a)(i) and (ii) and section 4.5(2)(b)(iii) and (iv).)

   Example 2

   O has granted an interest in Blackacre to A and has later granted a conflicting interest in Blackacre to B. A's interest is recorded after the grant to B. Then, B's interest is recorded. A's interest will be enforced with priority because it was recorded when B's interest was recorded. (See section 4.5(2)(a)(ii) and section 4.5(2)(b)(iv).)

   Example 3

   O has granted an interest in Blackacre to A. A's interest is recorded. Then O grants a conflicting interest to B. Then A's recording is cancelled on notice under section 4.9, but A's interest is not terminated. Then B's interest is recorded. A's interest will still be enforced with priority. (See section 4.5(2)(a)(i) and section 4.5(2)(b)(iii). See also section 4.7(3), which provides that the cancellation of the recording of an interest does not affect priorities which have accrued under section 4.5.)

Example 4

O has granted an interest in Blackacre to A and has later granted a conflicting interest in Blackacre to B. A's interest is unrecorded. Then B's interest is granted and recorded. However, B's interest was obtained by fraud. Section 4.5(2)(a) does not apply, because A's interest was not recorded when B's interest was obtained or recorded. Section 4.5(2)(b) does not apply because of section 4.5(2)(b)(ii), under which the obtaining of B's interest without fraud is a condition which must be satisfied before the subsection will confer priority. Section 4.5(1) applies, and the relative rights and priorities of A and B will be determined by the rules of common law and equity. The same would be true if B's interest, though obtained without fraud, was not obtained for value, under section 4.5(2)(b)(i).

Example 5

O has granted an interest in Blackacre to A and has later granted a conflicting interest in Blackacre to B. A's interest is not recorded. B's interest is obtained for value and without fraud and is recorded. B's interest will be enforced with priority over A's prior interest. (See section 4.5(2)(a).) This is the ordinary case, and is the principal case for which the interest recording system is provided.

2. The result in Example 3 is consistent with the present law as declared by the Court of Appeal of Saskatchewan in *Bensette v. Reece* [1973] 2 WWR 497 and by the Court of Appeal of Alberta in *Passburg Petroleums Ltd. v. Landstrom Developments Ltd.* [1984] 4 WWR 14. In the *Bensette* case, a purchaser acquired title subject to a caveated interest and then had the caveat removed under notice under the "lapsing" provision of the Saskatchewan statute. In the *Passburg* case, a purchaser acquired titled subject to a caveat registered by a lessee who was the appellant's assignor, and the caveat was discharged by the lessee. In each case, it was held that the caveated interest continued in force and that the purchaser's interest was subject to it despite the cancellation of the registration of the caveat.

   It is difficult to reconcile these cases on their facts with an earlier Supreme Court of Canada case, *Union Bank of Canada and Phillips v. Boulter Waugh Ltd.* (1919) 58 SCR 385, which was decided in favour of a mortgagee who had cleared off a prior caveat under the Saskatchewan lapsing provision. The *Union Bank* case, however, was decided entirely on questions of fraud and notice and did not consider the question of established priorities. The policy of the later cases is probably the law today, and is, in the Joint Committee's view, preferable in any event. The title registration and interest recording system is designed so that purchasers of interests in land can rely on registers. It is not a device to enable purchasers to get rid of prior conflicting interests.

In the *Bensette* and *Passburg* cases, the caveats were present both when the subsequent conflicting interests were obtained and when they were registered. The decisions do not specifically address a situation in which a recording is in the register when a subsequent conflicting interest is obtained but is not in the register when the subsequent conflicting interest is recorded or registered. However, the relevant time for reliance on the register is when a purchaser obtains his or her interest, and if a prior recording is on the register at that time, the purchaser's interest will under section 4.5(2)(b) be subject to the recorded interest.

3. A consequence of the rule that the cancellation of a recording does not deprive the recorded interest of its priority is that if a request for cancellation of a recording proves to be forged or unauthorized the recorded interest, unless terminated, will continue to have priority despite the cancellation of the recording. However, a person who relies upon a forged or unauthorized request for cancellation will be entitled to compensation under section 7.1(2).

4. Two points should be noted here:

   (a) section 4.5(2)(a) not only confirms the common law priority of a prior recorded interest, but confers priority upon a prior recorded equitable interest which, under the rules of common law and equity, would not be binding a bona fide purchaser for value of the legal interest or higher equitable estate;

   (b) section 4.5(2)(b) not only provides that a subsequent recorded interest is to be enforced with priority over a prior unrecorded interest, but also says that the prior interest is ineffective against the subsequent interest, which, together with section 4.5(5)(a), precludes any argument that if O, the owner, conveys Blackacre to A, he has nothing left to convey to B, so that the conveyance to B conveys nothing and B has nothing to record. This point is amplified in the annotation to section 4.5(5)(a).

Section 4.5(3)

Under section 4.5(3), a successor is entitled to the benefit of a prior owner's recording. Under section 1.1(o), a "successor" is "a person who acquires an interest, or an interest derived from that interest, directly or through intermediate transactions, from a prior owner". As between successors to the same prior owner, the rules in section 4.5(2) apply.

The effect of section 4.5(3) can best be shown by examples:

Example 1

O grants a prior interest to A and a subsequent interest to B. A records the prior interest. A satisfies section 4.5(2)(a) and the prior interest is entitled to priority over B. Then B records the subsequent interest. Then A assigns the prior interest to A1. A1 is entitled, without more, to enforce the prior interest with priority over B. (See section 4.5(3)(a).)

Example 2

O grants a prior interest to A and a subsequent interest to B. B records the subsequent interest. B satisfies section 4.5(2)(b) and is entitled to priority over A. Then A records the prior interest. B transfers the subsequent interest to B1. B1 is entitled to enforce the subsequent interest with priority over A's prior interest. (See section 4.5(3)(a).)

Example 3

O grants a prior interest to A and a subsequent interest to B. A records the prior interest. A satisfies section 4.5(2)(a) and the prior interest is entitled to priority over B. B then records. A then assigns the prior interest to M, who does not record. Then A assigns the prior interest again, this time to N, who does record and satisfies section 4.5(2)(b). Either M or N would be entitled to enforce the assigned prior interest with priority over B, but as between M and N, the provisions of section 4.5(2)(b) apply, and N is entitled to enforce the interest with priority over M, despite the common law priority of the assignment to M. (See section 4.5(3)(b).)

Section 4.5(4)

A principal function of the register is to disclose information about the ownership of land and interests in land. There is sufficient disclosure of an interest if it is recorded by recording the document on which it is based: it is for any person investigating title to decide what interest, if any, the recorded document has conferred. However, if an interest is recorded by recording a summary of the transaction on which it is based, the summary may be insufficient to disclose the nature of the recorded interest. Section 4.5(4) accordingly qualifies 4.5(2)(a) by restricting the priority preserved or conferred upon a prior interest by recording it to those rights expressly described in the recorded document.

The existing law about what a caveat must show has caused difficulties. For example, the Alberta Land Titles Act requires that a caveat state "the nature of the interest claimed and the grounds on which the claim is founded". It is fairly clear that a caveat which describes merely one claim does not protect another claim arising under the same agreement (*Ruptash and Lumsden* v. *Zawick* [1956] SCR 347) and that a caveat which claims under a lease will not, without more, protect an option to purchase conferred by the lease (*Powers v. Walter and Walter* [1981] 5 WWR 169 (Sask CA). On the other hand, it seems that a caveat which claims under a lease will protect a right of renewal granted by the lease, though not if the caveat sets out the term of the lease without including the renewal term (*Zeller's (Western) Ltd. v. Calford Properties Ltd.* [1972] 5 WWR 714 (Alta App Div). It also seems that a claim under an agreement in broad terms will protect whatever interests the agreement confers. This state of the law is not entirely satisfactory.

Section 4.5(4) establishes a strict test: if an interest is not "expressly described", the recording is not effective with respect to it. If the description describes less than the whole of an interest, the recording is not effective as to the remainder. A person who records only a summary will therefore incur a risk that the summary will be found inadequate and that interests which are not properly described will not be protected by the recording. However, the use of a summary will permit the recording of an interest which is not based upon a document and an interest which is based upon a document which the person recording cannot produce.

Section 4.5(5)(a)

Under the common law, O, the owner of Blackacre, who has conveyed Blackacre to A, has nothing left and cannot thereafter convey it to B, so that B gets nothing from a subsequent conveyance. It can be argued that B has no interest to record and that a recording of B's subsequent conveyance is therefore ineffective. Section 4.5.3(b) and section 4.5(5)(a) make it clear that the argument does not apply in a case in which B obtains the protection of recording and A does not. Assuming that the other conditions of section 4.5 are met by B, A's prior interest will become ineffective against B when B's subsequent interest is recorded, and, under section 4.5(5)(a), B's subsequent interest simultaneously becomes fully effective. After that time, B therefore has an effective interest and A does not.

Section 4.5(5)(b)

Section 4.5(2)(b) does not confer priority upon a subsequent recorded interest if the owner of the interest is a donee or acquired the interest by fraud. However, under section 4.5(5)(b), the interest becomes effective when it is acquired by a subsequent owner for value and without fraud. The following example illustrates the provision:

Example

O, the owner of Blackacre, grants a prior interest to A, who does not record it. O then grants a subsequent interest to B1, who is a donee or acquires the interest by fraud, and who does record the subsequent interest. B1 then assigns the subsequent interest to B2, who acquires it for value and without fraud and records it, all at a time when the grant to B1 is in force under the common law. Then A records the prior interest. B2 has satisfied all the conditions of section 4.5(2)(b) and is entitled to have the subsequent interest enforced with priority over A's prior interest. B2 would also be entitled to priority for a lesser interest acquired from B1.

Section 4.5(5)(c)

Under section 4.5(5)(c), once B or a successor has recorded a subsequent interest and has met all the conditions of section 4.5(2)(b), the interest is fully effective. If B conveys the interest to a donee, the donee is therefore entitled to enforce it with priority over a prior interest. If B is defrauded into conveying it, the conveyance is valid in the successor's hands if the general law would regard it as valid.

[Section 4.6 - Future obligations]

4.6

(1) Under section 4.5, the priority of a recorded security interest extends to all subsequent obligations which are secured by the security interest, including obligations for principal sums subsequently advanced, and increased interest, as determined in accordance with the terms of the document.

(2) If the secured person refuses to make further advances, or if the obligor has and exercises a right not to receive further advances, the secured person shall, at the request of the obligor, provide a termination of the security interest except insofar as it is security for

(a) obligations already incurred, and

(b) further advances made by the secured person under the terms of the document in order to maintain his security for obligations already incurred.

Annotation

Section 4.6

1. Section 4.6(1) confers upon the holder of a recorded mortgage or other security interest the same priority for obligations which arise after the recording or registration of another interest as for obligations which arise before such recording or registration. Since, under section 5.3(4), registration records a previously unrecorded interest, the benefit of section 4.6 applies to a registered security interest as well as to one which is merely recorded.

Suppose that O, registered owner of Blackacre, grants a mortgage for $40,000 to A, who records it. Suppose that O later grants a conflicting interest to B, who also records it. Suppose that at the time of B's recording the mortgage secured only $20,000 but that, in accordance with the terms of the mortgage, A makes a later further advance of $20,000 to O. The effect of section 4.6 is that the mortgage secures the additional obligations in priority to B's recorded interest. Similarly, if the mortgage term is extended and the interest increased in accordance with the terms of the mortgage, the registered mortgage secures the resulting obligations.

2. Section 4.6(2) is intended to prevent A from clouding O's title with the potentiality of future advances while refusing to make the advances.

[Section 4.7 - Cancellation of recording]

4.7

(1) The recording of an interest shall be cancelled

- **(a) when the interest is not qualified for recording under section 4.1,**
- **(b) in accordance with a request for cancellation by the claimant complying with any regulations made under section 2.3,**
- **(c) in accordance with section 5.4(2), when the registration of the interest has been cancelled, and**
- **(d) in accordance with an order of the Court under Part 8.**

(2) Subject to section 5.4(2), cancellation of the recording of an interest does not terminate the interest.

(3) Cancellation of the recording of an interest does not affect priority of enforcement rights which accrued under section 4.5 before the cancellation.

Annotation

Section 4.7

1. An interest exists whether or not it has been, or is, recorded. Therefore, the cancellation of the recording of an interest, without more, will not terminate the interest. (See section 4.7(2).) In order the clear both a *title* and a *register* of a recorded interest, it will be necessary to procure both the termination of the interest and the cancellation of the recording. This follows existing law.

2. Another consequence of the existence of an interest whether or not it is recorded is that the priority of an interest, once established by a recording, continues despite the cancellation of the recording. (See section 4.7(3) and section 4.5(2)(a) and (b).) The cancellation of the recording of an interest will make it possible for subsequent interests to be acquired and recorded with priority over it, but that is its only effect.

3. Recordings will commonly be cancelled

   (a) by Registrars in accordance with written requests from claimants, i.e., persons who record interests or assignees of rights to cancel. Requests for cancellations will have to be authenticated in accordance with regulations under section 2.3(b)(iii), which will apply the standards applied to registered documents (see section 4.7(1)(b);

   (b) as an automatic consequence of the cancellation of registrations, by the action of section 5.4(2), to which section 4.7(1)(c) is subject.

   Recordings will also be cancelled by Registrars under court orders where the Court determines that a recording is not supported by an effective interest in land (see section 4.7(1)(d).

4. It is possible that a recording will upon occasion be cancelled because the recorded interest did not qualify under section 4.1 in the first place, i.e., because it is not an interest at all and the recording is void. A Registrar might cancel a recording on such grounds, but is unlikely to do so without a court order.

[Section 4.8 - Cancellation of recording by assignee]

4.8

(1) The right to have the recording of an interest cancelled, or the enforcement of a recorded interest postponed, may be assigned by the claimant of the recorded interest by a document complying with any regulations made under section 2.3, and the assigned right shall be treated as a registrable interest under Part 5.

(2) Until an assignment under subsection (1) is registered, the claimant under the recording retains the right to have the recording cancelled, or the enforcement of a recorded interest postponed.

Annotation

Section 4.8

Suppose that O, the owner of Blackacre, grants a petroleum and natural gas lease to A1, who records the interest. Suppose that O later transfers the land to B, who becomes registered as owner subject to A1's recording. Suppose that A1 then assigns the lease to A2. A2's priority is protected by A1's recording. However, A2 is likely to want to be assured that no one but A2 can cancel A1's recording, and is also likely to want to be able to cancel it himself or herself without obtaining a request for cancellation from A1.

Section 4.8 accordingly gives a person who records an interest power to assign the right to request the cancellation of the recording and the right to postpone the enforcement of the recorded interest to the enforcement of another interest. The assigned right is treated as a registrable interest, and the authenticity of the assignment will have to be verified to the standards of a document presented for registration under regulations prescribed under section 2.3(b)(iii). In the example given, A2 would be likely to require A1 to assign both the lease and the right to cancel the recording.

[Section 4.9 - Cancellation of recording on notice]

4.9
(1) Except for

(a) a recorded interest which is registered,

(b) a Registrar's recording under section 5.7(2), and

(c) a recorded interest under a restrictive covenant annexed to land,

a recording shall be cancelled after the expiration of 60 days after notice, in the prescribed form, to take proceedings in court on the recorded interest has been either

(d) served as process is usually served, or

(e) served through registered mail, in the prescribed form, to the claimant under the recording at the address for service of notices with respect to the recording,

unless before the cancellation the claimant takes proceedings in court by originating notice or otherwise to substantiate the recorded interest and a certificate of lis pendens in the prescribed form has been recorded.

(2) Notwithstanding subsection (1), the Court may on an ex parte application shorten the period of 60 days to a period it specifies in the order, and a copy of the order shall be served or mailed with the notice.

(3) It shall be proved to the satisfaction of the Registrar

(a) that the notice was served as required by subsection (1), and

(b) that the person who caused the notice to be served has a recorded or registered interest in the land against which the recording to be cancelled was recorded.

(4) A person who

(a) procures the cancellation of a recording under this section, and

(b) has served notice under subsection (1)(e)

is liable for any loss sustained because of the cancellation unless the Court finds that the method of service was reasonable under the circumstances.

Annotation

Section 4.9

1. The recording of an interest does not mean that the interest exists or is valid. The recording is merely a claim. Section 4.9 therefore provides a mechanism by which a challenger who has a recorded or registered in the land can require the claimant under a recording to have the claim validated by a court, or, alternatively, can obtain the cancellation of the recording.

   The mechanism is simple enough. Suppose that O is the registered owner of Blackacre and A1 has recorded an interest in Blackacre. O will serve a notice upon A1 to take proceedings in court on the recorded interest. Unless A1 commences proceedings and records a certificate of lis pendens within 60 days or another period fixed by the Court, the Registrar, upon proof of service, will cancel the recording.

2. The section permits service of the notice to take proceedings by registered mail at the address for service of notices given by the claimant. This provision is capable of abuse, as an address for service can become obsolete and A1 may fail to receive the notice and thus lose the benefit of the recording without receiving a warning. Therefore, section 4.9(4) imposes liability upon O for any loss sustained by A1 if O serves the notice by registered mail and thus procures the cancellation of the recording, unless the Court finds that the method of service was reasonable under the circumstances, and the Court would not be likely to make such a finding unless the challenger had reason to think that the notice would be received. There would, of course, be no loss if A1 did not have a valid interest,

whether because it did not exist in the first place or because it had been terminated.

3. If A1 has assigned to A2 the right to cancel the recording under section 4.8, and if the assignment has been registered, the notice to take proceedings will have to be served on A2 and not on A1 (see section 1(1)(c)).

[Section 4.10 - Improper recording]

4.10 If a recording

(a) was void because the interest was not qualified for recording under section 4.1, or

(b) was not cancelled at the request of the claimant under the recording

(i) after the interest ceased to exist under law, and

(ii) after written demand for cancellation by a person adversely affected by the recording,

the claimant under the recording is liable to any person who sustains loss because of the initial recording or its continuance unless

(c) the Court finds that the initial recording or its continuance was reasonable under the circumstances, or

(d) the recording was made by a Registrar under section 5.7(2).

Annotation

Section 4.10

1. The right to record an unsubstantiated claim can be abused. Suppose that O is the registered owner of Blackacre and that A1 has recorded an interest in Blackacre which is not a valid interest. Under section 4.10, A1 would be liable to O for any loss suffered by O because of the wrongful recording unless the Court finds that the recording was reasonable under the circumstances. Similarly, suppose next that A1 had a valid interest but it has been terminated. O is then entitled to give a written demand that A1 cancel the recording, and A1 will be liable to O for any loss sustained by O because of the wrongful continuation of the recording unless the continuation was reasonable under the circumstances.

2. If A1 has assigned to A2 the right to cancel the recording under section 4.8, and if the assignment has been registered, the demand for cancellation will be made to A2 rather than A1, and it will be A2 rather than A1 who is liable to O for loss sustained by O.

PART 5

REGISTRATION

[Section 5.1 - Registrable interests]

5.1
(1) The following interests may be registered:

(a) a fee simple estate, whether possessory or under a future interest, whether absolute, determinable or conditional, and whether or not held in tenancy in common or joint tenancy;

(b) a life estate, whether absolute, determinable or conditional;

(c) a leasehold;

(d) a servitude;

(e) a profit a prendre;

(f) a security interest;

(g) the interest under a postponement agreement;

(h) *an option to acquire a registrable interest*;

(i) *the interest of a purchaser under an agreement to purchase land.*

NOTE: Items (h) and (i) are optional.

(2) If another Act requires or authorizes the registration of an interest, and the interest is not qualified for registration under subsection (1), the interest shall be recorded.

Annotation

Section 5.1(1)

Section 5.1(1) lays down the general principle that interests of the kinds listed may be registered.

"Servitude", "security interest", and "postponement" are defined in section 1.1. The interest under a postponement agreement is included as a registrable interest because it effectively changes the ownership and priority rights of registered owners and the priority rights of recorded owners, and it is desirable that postponement agreements be authenticated in the same way as other documents conferring interests which are to be registered.

Section 5.1(2)

It is common for other statutes to confer rights or claims against land and to provide for the "registration" of such rights and claims against the land affected. In such a case, it is appropriate to look to the other statute as the source of legal ownership, and it is unlikely that the Legislature intends that the title registration statute is to be an independent source of title. For those reasons, section 5.1(2) provides that if another statute provides for the "registration" of an interest against land, the interest is to be recorded rather than registered, unless it is of a kind which is registrable under the section.

[Section 5.2 - Registration]

5.2

(1) A Registrar shall register an interest upon request if

- **(a) the interest is qualified for registration under section 5.1,**
- **(b) the person to be registered as owner has legal capacity to own the interest, and**
- **(c) the interest is based on a valid transaction.**

(2) Any registration which is not authorized under subsection (1)(a) or (b) is void for the purposes of this Part.

(3) If a registration is void under subsection (2) because not authorized under subsection (1)(b), the Crown in right of [*enacting jurisdiction*] is the legal owner of the interest under the purported registration, in trust for whomever the law determines the interest should be held.

Annotation

Section 5.2(1)

Section 5.2(1) makes registration of a qualified interest a matter of right if the conditions set out in it are met.

The conditions are that

(a) the interest is qualified for registration under section 5.1.

> Only something which the general law will recognize as being a fee simple estate, a life estate, a leasehold, a servitude, or one of the other interests listed in section 5.1, can be registered. A purported registration will not transform something else into a registrable interest; it will not, for example, transform a licence into a lease, and the purported registration of a licence as a lease will, under section 5.2(2), be void as a registration. Under section 5.3(4), the licence will be recorded, despite the fatal flaw in the registration.

This condition will require the Registrar to decide whether an interest submitted for registration is a registrable interest. However, regulations under section 2.3(b)(iii) will prescribe forms of documents which the Registrar will accept as conferring qualified interests.

(b) the person to be registered as owner has legal capacity to own the interest.

Only a person whom the general law will recognize as having capacity to own an interest can be registered as owner of the interest. A purported registration in the name of Hercules or of a non-existent corporation will not transform either into a person with capacity to own an interest and will be void under section 5.2(2).

This condition recognizes the impossibility of conferring ownership upon something which cannot have rights. Section 5.2(3) fills the resulting void by vesting legal ownership of the interest in the Crown in trust for whomever the general law will recognize as the owner of the registered interest.

(c) the interest is based upon a valid transaction.

A Registrar will register an interest only if there appears to be a valid "transaction". Under the definition in section 1.1(s), "transaction" is broad enough to include any passing of an interest by act of an owner or operation of law, but the Registrar will, except under court order, act only on transactions which comply with regulations under section 2.3.

Suppose that O is the owner of an estate in fee simple absolute in Blackacre. Suppose that A presents to the Registrar a document which purports to be a transfer from O to A but is in fact a forgery. The Registrar is not obliged to accept the alleged transfer or to register A as owner of Blackacre, and will not do so if he knows that the document is forged.

However, the lack of a valid transaction does not render a registration void. If the Registrar accepts the forged transfer, A will become the registered owner, and therefore the legal owner, of Blackacre. O will be able to recover ownership only if A's registration can be cancelled under sections 5.4 to 5.7. Section 5.2(2) renders a registration void only for failure to meet conditions (a) and (b), and section 5.3(1), which makes a registered owner the legal owner of the registered interest, applies notwithstanding section 5.1(1)(c).

Section 5.2(2)

1. Under section 5.2(2), a purported registration is void for the purposes of Part 5 if it is not authorized under section 5.2(1)(a), that is to say, if the purportedly registered interest is not of one of the kinds listed in section 5.1. However, if the

interest exists under the general law, the purported registration, though void as a registration, will have the effect of a recording under section 5.3(4)(b).

2. A purported registration is also void for the purposes of Part 5 if it is not authorized under section 5.2(1)(b), that is to say, if the purportedly registered owner does not have legal capacity to own the registered interest. However, section 5.2(3) fills the resulting lacuna.

3. Being void only for the purposes of Part 5, a purported registration is a registration within the meaning of the compensation provisions of Part 7.

Section 5.2(3)

Section 5.2(3) fills the lacuna which would otherwise occur if a purported registered owner is not a person with legal capacity to own the interest. It does so by making the Crown in right of the province the legal owner of the interest, in trust for the owner recognized by the general law.

[Section 5.3 - Effect of registration]

5.3

(1) **Notwithstanding section 5.2(1)(c), so long as a registration remains uncancelled, the registered owner is the owner of the registered interest as defined in the register and within the parcel described in the register,**

(a) **if the interest is qualified for registration under section 5.1,**

(b) **if the registered owner has legal capacity to own the interest, and**

(c) **to the extent that the interest is recognized under law.**

(2) **For the purposes of subsection (1)(c), a security interest is recognized under law only to the extent of the actual obligation of the obligor under law.**

(3) **A registered interest shall be enforced with priority in accordance with section 4.5.**

(4) **An interest which was not previously recorded is recorded for the purposes of section 4.5 at the time of**

(a) **its registration, or**

(b) **its purported registration if its registration is void under section 5.2.**

(5) **A registered interest has been obtained for value for the purposes of section 4.5.**

(6) **A registered interest is, at the time of registration, subject to**

(a) **a transaction which binds the registered owner,**

(b) **a conflicting interest in accordance with section 4.5, and**

(c) an interest under section 6.1.

Annotation

Section 5.3(1)

1. The principal thrust of section 5.3(1) is that is a person who is registered as the owner of an interest is the legal owner of the interest. By providing that it overrides section 5.2(1)(c), section 5.3(1) makes itself a new root of title even if ownership was not conveyed to the registered owner by a valid transaction with a previous owner or by operation of law. If there was no valid transaction, ownership will usually be subject to being set aside under section 5.4(1)(d), but until it is set aside, the registered owner will be the legal owner of the interest. Section 5.3(1) will apply even if no value has been given.

   It would be absurd for the law make a declaration of ownership while declaring a registration void. Section 5.3(1) therefore does not apply to registrations which section 5.2(2) declares void: the cases described in section 5.2(1)(a) and (b) (which are the cases in which section 5.2(2) declares a registration void) are the same as the cases described in section 5.3(1)(a) and (b).

2. Under section 5.3(1)(c), there is a third case in which the declaration of ownership will not apply. It is a case in which what is purported to be registered is not an interest in land, so that a system of registration of title to land should not apply to it. The limitation is implicit in the definition of "interest", but section 5.3(1)(c) makes it explicit.

3. The cases mentioned above are the only cases in which registration does not confirm or confer legal ownership. In other cases mentioned in section 5.4(1) (fraud and unauthorized registrations, for example), a displaced owner may have a right to have registrations revised and thus regain legal ownership, but that is all.

Section 5.3(2)

If O, the owner of Blackacre, grants a mortgage to A which purports to secure a stated amount, and A registers the mortgage, the amount secured by it will be the amount determined by the state of accounts between the parties, not the amount stated in the mortgage. This is the general law, and it has been applied under Canadian title registration systems. Section 5.3(2) of the Model Act adopts it and applies it to all security interests.

Section 5.3(3) and (4)

Section 5.3(1) deals with the ownership of registered interests. Section 5.3(3) and (4) deal with their priority. The registration of an interest will have the effect of recording a previously unrecorded interest and thereby conferring priority upon it as if it were being recorded at the time of registration. Registration will not displace the priority conferred by an earlier recording of the same interest.

Under section 5.2, the registration of an interest will be void if the interest is not one of those listed in section 5.1, or if the registered owner does not have legal capacity to own it, or if the interest is not recognized by law. If the interest is not qualified under section 5.1, it will nevertheless be recorded, so that its priority will be preserved. If the registered owner does not have legal capacity, the interest will still exist and be owned by the Crown in trust, so that the recording will protect its priority. If the interest is not recognized by law, neither registration nor recording will protect it.

Section 5.3(5)

Section 4.5 will confer priority upon a subsequent recorded interest only if it was obtained for value. By providing that a registered interest *has been* obtained for value for the purposes of section 4.5, section 5.3(5) will confer priority upon a registered interest even if no value has been given for it in the usual sense.

Section 5.3(6)

Section 5.3(6) summarizes the effect of the Model Act with respect to the effect of registration on priorities. If O, a registered owner, has granted an interest in the land to A, O's interest will be subject to A's interest, which was granted by "a transaction which binds the registered owner" under section 5.3(6)(a), and it does not matter whether or not A's interest is recorded or registered. If A has a prior interest which is entitled to prior enforcement under section 4.5, whether under a recording or otherwise, O's interest will be subject to it under section 5.3(6)(b). Under section 5.3(6)(c), A's interest will also be subject to any overriding interests mentioned in section 6.1 to which the general law would give priority.

[Section 5.4 - Revision of registrations]

5.4

(1) Registrations shall be revised as required

- **(a) by a transaction binding the registered owner,**
- **(b) for the enforcement of a conflicting interest entitled to priority of enforcement under section 4.5,**
- **(c) when a registration was obtained through the fraud of the registered owner,**
- **(d) subject to sections 5.5 and 5.6, when a revision of registrations was not authorized by a valid transaction,**
- **(e) when a conflicting interest will be enforced with priority over the registered interest in accordance with section 5.8,**
- **(f) by sections 5.5 and 5.6, and**
- **(g) by an order of the Court under Part 8.**

(2) The cancellation of the registration of an interest divests the interest and cancels its recording.

(3) A Registrar may refuse to revise a registration, notwithstanding that a document complies with any regulations made under section 2.3, if he obtains knowledge which he reasonably believes indicates that, because of a disputed question of fact or law, the revision might result in a registration not in accordance with law.

Annotation

Section 5.4(1)

Under the usage of the Model Act, a "revision" of registrations is an entry in a register which changes the registered ownership of an interest, including a cancellation or postponement. Registrations will be revised by the Registrar, acting under statutory powers or under court orders. Section 5.4(1) lists the circumstances under which revisions of registrations are to take place.

Specific comments are as follows:

(a) Revisions under transactions (section 5.4(1)(a)

Given the broad definition of "transaction" in section 1.1(s), section 5.4(1)(a) is broad enough to include conveyances and contracts entered into by registered owners and the passing of interests by operation of law, such as bankruptcy and estate transmissions and expropriations.

Registrars will revise registrations on the basis of conveyances (including postponements and requests for cancellation of registrations) and transmissions which conform to regulations. Other revisions will require court orders.

Section 5.4(1)(a) does not impose a time limit. So long as the registration of an owner continues, an entitlement to a revision of registrations on the basis of transactions binding on that owner will continue.

(b) Enforcement of conflicting interests (section 5.4(1)(b)

Section 4.5 establishes the priorities among conflicting unrecorded and recorded interests, and section 5.3(3) and (4) bring registered interests into the same system of priorities. If it is necessary to revise registrations in order to give effect to priorities, that will be done, usually under court order.

Suppose, for example, that O, the registered owner of Blackacre, enters into a sale agreement with A, who records it, and then transfers Blackacre to B, who becomes registered as owner. When A's obligations under the sale agreement are fully performed, A is entitled to have registrations revised, that is, to become registered as owner of Blackacre and to have B's registration cancelled.

(c) Revisions in cases of fraud (section 5.4(1)(c)

If B has become registered as owner of an interest under a conveyance obtained by him or her from O, the registered owner, by fraud, the registration is effective, but O has a statutory right under section 5.7 to have registrations revised to restore the benefits of the registered interest. If B has become registered in priority over A, the holder of an unrecorded and unregistered interest, by fraud, A will have a similar statutory right. (See section 1.2 and annotations to it with respect to the meaning of fraud for this purpose.)

Without more, the right to revision will last only while B remains the registered owner of the interest. However, O or A will be entitled to record the interest under section 5.7(1)(b) and to enforce it with priority according to the time of the recording.

(d) Revisions where no valid transaction (section 5.4(1)(d) and (f)

If B becomes registered as owner of an interest despite the lack of a valid transaction in his or her favour, the registration will be effective, but O, the displaced registered owner, will have a statutory right under section 5.7 to have registrations revised to restore the benefits of the registered interest.

Suppose that the registration of O as owner of an interest is cancelled, that A is registered as owner of the same interest, and that no valid transaction authorized the cancellation of O and the registration of A. There are two possibilities:

(a) that A believed that there was a valid transaction and did not know the facts that rendered it invalid, in which case section 5.6 will apply, the Court will decide which of O and A should be registered (with a presumption in favour of O), and the other will receive compensation;

(b) that A did not so believe, in which case section 5.5 will apply, and O will be entitled to have registrations revised as against A, but not as against B, a successor to A who becomes registered without fraud.

(e) Revisions in a case of conflicting registers (section 5.4(1)(e)

In the unlikely event that two registers are established for the same parcel or interest and that interests are derived from each or all of the interests which initially came into conflict through the two registers, the Court will decide which register is to take priority, and registrations can then be revised under section 5.4(1)(e) to give effect to the decision. See section 5.8 and its annotations.

Section 5.4(2)

So long as a registration remains uncancelled, the registered owner will be the owner of the registered interest under section 5.3(1). Because the declaration applies only while the registration is uncancelled, cancellation of the registration will terminate the declaration of ownership, and section 5.4(2) will go on to divest the interest and cancel its recording. The legal ownership of the divested interest will either vest in a new owner or, if it is not transferred and is a derived interest, will merge in the interest from which it is derived and thus will be effectively transferred to the owner of that interest.

Section 5.4(3)

The purpose of section 5.4(3) is to allow the Registrar to withhold a registration when he knows that there is a controversy between two parties about the validity of a document. While the effect of the section is not specifically limited in time, it may be expected that any withholding of registration will be brief and merely to enable all parties to take steps to protect their respective positions.

[Section 5.5 - Reliance on improper registration]

5.5

(1) This section is applicable when

(a) a registration was not authorized by a valid transaction,

(b) a subsisting or former registered owner has a statutory interest under section 5.7,

(c) an interest has been obtained by an owner as a successor from the owner under the unauthorized registration, and

(d) that interest is entitled to priority of enforcement under section 4.5 over the statutory interest.

(2) When this section applies,

(a) registrations shall be revised, notwithstanding prejudice to the subsisting or former registered owner referred to in subsection (1)(b), as required for the enforcement of the interest referred to in subsection (1)(c), and

(b) registrations shall not be revised to the prejudice of the interest referred to in subsection (1)(c) on the grounds that the registration of the owner under the unauthorized registration was subject to revision under section 5.4(1)(d).

(3) A registered owner who sustains loss under this section shall be compensated in accordance with Part 7.

Annotation

Section 5.5

1. Suppose that O was registered as owner of an estate in fee simple absolute in Blackacre. Suppose further that A has, without any valid transaction, become registered as owner of Blackacre (for example, upon the basis of a forged or

otherwise unauthorized transfer or a simple mistake of transcription in the land registration office), and O's registration has been cancelled. Suppose further that A knows that there is no valid transaction and is therefore not entitled to the protection of section 5.6.

Under section 5.4(1)(d), A's registration will be subject to revision (i.e., cancellation) because of the lack of a valid transaction, and O will have a statutory interest under section 5.7(1) which will entitle O to the benefits of the interest which was prejudiced by A's registration (i.e., the estate in fee simple in Blackacre). Accordingly, O will be entitled to have A's registration cancelled and to become registered as owner of Blackacre. Section 5.5(1) does not apply in terms because no interest has been obtained by an owner as a successor from A as required by section 5.5(1)(c), and it does not apply in policy because no third party is involved.

2. Suppose, next, that B becomes registered owner of Blackacre on the basis of a transfer from A. The conditions of section 5.5(1)(a), (b) and (c) have now been satisfied. Suppose further that B acquired and registered the transfer from A without fraud and that A's statutory interest under section 5.7(1) is not recorded. B's registered interest is recorded and must be enforced with priority in accordance with section 4.5 (see section 5.3(3) and (4)), and it satisfies the conditions for priority of a subsequent interest under section 4.5(2)(b). The condition of section 5.5(1)(d) (that B's registered interest must be entitled to priority over O's statutory interest) has now been satisfied. Section 5.5 applies.

Section 5.5(2)(a) provides that, under the circumstances described above, registrations must be revised as required for the enforcement of the interest referred to in section 5.5(1)(c), that is, B's interest. On the facts so far given, that provision is unnecessary, because B is the sole registered owner, and no revision of registrations is required for the enforcement of B's interest.

3. Suppose, however, that O's registration was *not* cancelled. There would then be two valid registrations, one naming O as the registered owner and the other naming B. On these facts, a revision of registrations (i.e., the cancellation of O's registration) is required for the enforcement of B's registered interest. Since section 5.5(2)(a) provides that registrations shall be revised, notwithstanding prejudice to O, as required for the enforcement of B's interest, it follows that O's registration must be cancelled.

Section 5.5(2) goes on to provide that registrations are not to be revised to the prejudice of B's interest on the grounds that A's registration was subject to revision (i.e., cancellation) under section 5.4(1)(d). This ensures that B's registration will be enforceable.

4. Essentially, what section 5.5 says is that a person who acquires an interest from a registered owner and becomes registered as owner of the interest acquires ownership free and clear of the unrecorded and unregistered claims of prior owners, even if a prior owner has an existing registration. This result is necessary for the promotion of facility of transfer. A similar example could be constructed for any case in which the interest registered in the name of A and acquired by B is an interest which conflicts with the interest of O.

5. For a discussion of a case in which A obtains registration in the belief that it was authorized by a valid transaction and without knowledge of the facts that rendered it invalid, see section 5.6 and the annotations thereto. For a discussion of a case in which there are conflicting registers and interests have been acquired from the holders of two conflicting interests under the two registers, see section 5.8 and the annotations thereto.

[Section 5.6 - Reliance on invalid transaction]

5.6

(1) This section is applicable when a registration

- **(a) was not authorized by a valid transaction, but**
- **(b) was requested by the registered owner**
  - **(i) in the belief that it was authorized by a valid transaction, and**
  - **(ii) without knowledge of the facts which rendered the transaction invalid, and**
- **(c) has prejudiced another subsisting or former registered owner.**

(2) When this section applies, either the registered owner or the prejudiced person may apply to the Court under Part 8 for

- **(a) a declaration of the rights of the parties, and**
- **(b) orders for revision of registrations and for compensation.**

and shall name the Registrar General as a party to the proceeding.

(3) In an action under subsection (2), the Court shall determine the rights of the parties in accordance with the following principles:

- **(a) subject to subsections (4) and (5), the prejudiced person has a right to have registrations revised as required to nullify the effects of the unauthorized registration, and**
- **(b) the registered owner has a right to be compensated in accordance with Part 7 for the loss sustained because of the revisions.**

(4) The Court may, if it is just and equitable, do both (but not one only) of the following:

(a) confirm the unauthorized registration, and

(b) direct that the prejudiced person be compensated in accordance with Part 7 for the loss sustained because of the confirmation of the unauthorized registration.

(5) In deciding whether it is just and equitable to exercise its powers under subsection (4), the Court shall consider the following circumstances:

(a) the nature of the ownership and the use of the property by either of the parties,

(b) the circumstances of the invalid transaction,

(c) the special characteristics of the property and their appeal to the parties,

(d) the willingness of one or both of the parties to receive compensation,

(e) the ease with which the amount of compensation for a loss may be determined, and

(f) any other circumstances which, in the opinion of the Court, may make it just and equitable for the Court to exercise or refuse to exercise its powers under subsection (4).

(6) If the Registrar General is satisfied that this section applies,

(a) he may enter into an agreement with either the registered owner or the prejudiced person providing for payment of compensation and reasonable expenses of bringing the claim, and

(b) the agreement is deemed to be an agreement under section 7.5(2).

(7) Section 7.7 applies to an agreement entered into under subsection (6) and to an order for compensation made under this section.

Annotation

Section 5.6

1. Suppose that O was registered as owner of an estate in fee simple absolute in Blackacre. Suppose further that A has, without any valid transaction, become registered as owner of Blackacre (for example, upon the basis of a forged or otherwise unauthorized transfer or a simple mistake of transcription in the land registration office), and O's registration has been cancelled.

   Up to this point, the fact situation is the same as that in the first example discussed under section 5.5. However, suppose further that A obtained registration in the belief that it was authorized by a valid transaction and without knowledge of the facts which rendered the transaction invalid, for example, in the belief that a forged document was in fact a valid transfer from O to A. (The reverse supposition was made in the section 5.5 example.) The conditions of section 5.6(1) are met, and section 5.6 applies.

2. The effect of section 5.6, where it applies, is as follows:

   (1) Both O and A have remedies. One will keep or regain ownership of Blackacre. The other will receive compensation.

   (2) The presumption is in favour of O regaining ownership, which will involve the cancellation of A's registration and O's re-registration as owner. In that event, A will receive compensation. (See section 5.6(3).)

   (3) However, if it is just and equitable to do so the Court may award ownership to A under section 5.6(4), in which case A's registration will be confirmed and O will receive compensation. In deciding what is just and equitable, it may consider not only the factors specifically listed in section 5.6(5)(a) to (e), but also, under section 5.6(5)(f), any other relevant factors.

3. Under *Frazer v. Walker* [1967] AC 569 (PC), A's ownership would always be confirmed if A gave valuable consideration. This is probably the law of the Torrens-based jurisdictions. It is probably the law of British Columbia with

respect to a fee simple estate, though not, under *Credit Foncier v. Bennett* (1963) 43 WWR 546 (BCCA), with respect to a registered charge.

4. The *Frazer v. Walker* approach promotes facility of transfer. Under it a purchaser who receives documents in the ordinary course of business need not engage in elaborate and usually futile investigations to determine whether the documents are genuine. Section 5.6 operates somewhat differently. It assures A of a remedy, which is enough to promote facility of transfer. It recognizes that in most cases it will be better to restore ownership to O and compensate A, but that there may be cases in which the remedies should be reversed. It is closer in principle to section 60(12) of the Ontario Land Titles Act under which there is a discretion to cancel A's registration and pay compensation for doing so.

5. Section 5.6 will apply to a case in which a forged or unauthorized request for cancellation of a registration is accepted by a Registrar and registrations are revised accordingly. "Registration", under section 1.1(l) includes the administrative process which terminates interests, so that the cancellation of a registration is a registration under section 5.6(1). If the person receiving the request for cancellation believes it to be valid, he believes that it was authorized by a valid "transaction" under section 5.6(1)(b)(ii), because "transaction", under section 1.1(s), includes a document which effects a "termination", which, in turn, is defined by section 1.1(q) so as to include a document releasing or discharging an interest, and, under section 5.4(2), the cancellation of a registration divests the interest.

6. Since the policy of the Model Act is to protect not only purchasers but volunteers who achieve registration, section 5.6 will apply even if A has not given consideration for the invalid disposition.

[Section 5.7 - Entitlement to revision of registrations]

5.7

(1) When a registration is subject to revision under section 5.4(1)(c) or (d), the person whose registered interest was prejudiced by the registration subject to revision has a statutory interest which

(a) entitles the person to the benefits of the registered interest which he is entitled to obtain,

(b) may be recorded under section 4.1, and

(c) is subject to the enforcement priority provisions of section 4.5.

(2) If a Registrar obtains knowledge which indicates that a statutory interest may exist under subsection (1), but is not authorized to revise a registration under section 5.4(3) because of a disputed question of fact or law, the Registrar shall record the possible interest.

Annotation

Section 5.7(1)

1. Suppose that the registration of O as owner of Blackacre has been terminated and A has become registered as owner through A's fraud. Section 5.4(1)(c) provides that registrations shall be revised as required, and section 5.5 does not help A, so that A's registration is subject to being set aside. Alternatively, suppose that O's registration has been terminated and A has become registered as owner without the authority of a valid transaction, and A did not acquire the registration in the belief that it was authorized by a valid transaction and without knowledge of the facts which rendered the transaction invalid. In this case, section 5.4(1)(d) provides that registrations may be revised, and section 5.6 does not apply, so that, again, A's registration is subject to being set aside.

   A is the legal owner of Blackacre under section 5.3(1). However, section 5.7(1) confers upon O a statutory interest which entitles O to the benefit of the registered estate in fee simple. This right co-exists with the legal ownership and includes the right to have the legal ownership taken away from A and returned to O. O is entitled to apply to the appropriate court to have A's registration cancelled and to have O registered as owner of Blackacre.

2. O's statutory interest is, however, vulnerable. It will not be enforceable against another person, B, who becomes registered or recorded as owner of Blackacre or of any lesser interest in Blackacre on the basis of a valid transaction from A and without fraud. Section 5.7(1)(b) therefore provides that O may record the statutory interest. If the interest is recorded before B's interest is registered or recorded, it will be a prior interest and enforceable as such against B under section 4.5.

Section 5.7(2)

Section 57(2) requires a Registrar who acquires knowledge that a registration may have been brought about by fraud or without a valid transaction, so that a statutory interest may exist under section 5.7(1), to record the possible statutory interest. This will protect the possible statutory interest against further dispositions and give the holder a chance to enforce it.

[Section 5.8 - Conflicting registrations]

5.8

(1) In this section,

(a) "root registered interests" means the interests registered in different registers, whether parcel or interest registers, which resulted in the initial conflict between the interests registered in different registers, and

(b) "derived interests" means interests, whether or not recorded or registered, which are derived from a root registered interest.

(2) This section is applicable to determine the priority of enforcement of derived interests from one root registered interest relative to derived interests from another root registered interest.

(3) This section is not applicable to determine the priority of enforcement of conflicting

(a) root registered interests,

(b) interests under registrations to which section 5.4 (except section 5.4(1)(e)), and sections 5.5 and 5.6 apply, and

(c) interests derived from only one root registered interest.

(4) When this section is applicable, all of the derived interests from one root registered interest shall be enforced with priority over the conflicting derived interests from another root registered interest in accordance with the first of the following sequence of rules which establishes the derived interests to be enforced with priority:

Rule 1.

If there is actual possession of land under an interest conferring a right to possession, whether a root registered interest or a derived

interest from it, the derived interests from that root registered interest shall be registered with priority.

Rule 2.

If there is an interest obtained for value derived from one root registered interest, and no such interest derived from another root registered interest, the derived interests which include the interest obtained for value shall be enforced with priority.

Rule 3.

The derived interests from the root registered interest which was not subject to revision under section 5.4 when the initial conflict between interests registered in different registers occurred shall be enforced with priority.

(5) Any owner who sustains loss because the derived interests from another root registered interest are enforced with priority under this section shall be compensated in accordance with Part 7.

Annotation

Section 5.8(1)-(3)

The law cannot say that each of two persons owns the same interest in land to the exclusion of the other or that each of two persons is entitled to enforce conflicting interests with priority over each other. Some special principle must apply to determine which of the two will prevail.

The question as to when the special principle should apply, and the answer given by section 5.8, may be illuminated by examples:

Example 1

A is the registered owner of Blackacre and Greyacre under Register 1. A transfers Blackacre to B. The Registrar, in another register (Register 2), registers B as the owner of both Blackacre and Greyacre, but does not cancel A's registration as owner of Greyacre and does not cancel Register 1. The fact situation, accordingly, is that Register 1 register says that A is the owner of Greyacre and Register 2 says that B is the owner of Greyacre.

In this example, there are two conflicting registers which make two conflicting statements about the ownership of Greyacre. However, the conflict can be settled without resort to a conflicting registers provision. That is because A's statutory interest under section 5.7 entitles A to have B's registration cancelled, leaving A the sole registered owner of Greyacre.

Section 5.8 does not apply. It does not apply in terms because, while there is a conflict between root registered interests, there is no conflict between derived interests. It does not apply in policy because A has a statutory right to revision. If there is a contest at that point, A will win. Section 5.4(1)(d) applies.

Example 2

The facts are the same as in Example 1, except that C has obtained a transfer of Greyacre from B without fraud and has registered it and become registered as owner of Greyacre. The fact situation is now is that (a) Register 1 says that A is the registered owner and (b) Register 2 says that C is the registered owner. Again there are two conflicting registers, and two conflicting statements about the ownership of Greyacre.

Section 5.8 does not yet apply. It does not apply in terms. There is now only one derived interest (C's interest). Therefore, although there is a conflict between one derived interest and one root registered interest, there is no conflict between two derived interests. It does not apply in policy because the policy in favour of facility of transfer requires the law to protect the last person who, under the hypothetical facts, obtained an interest from a registered owner. If there is a contest, C will win. Section 5.5 applies.

Example 3

The facts are the same as in Example 1, except that

(a) C has, as in Example 2, obtained a transfer from B without fraud and has become registered as owner of Greyacre, and

(b) D has obtained a transfer from A without fraud and has become registered as owner of Greyacre.

The fact situation is now that (a) Register 1 says that D is the registered owner and (b) Register 2 says that C is the registered owner. Again, there are two conflicting statements about the ownership of Greyacre.

Section 5.8 applies. It applies in terms because

(a) A's fee simple and B's fee simple are root registered interests registered in different registers which resulted in the initial conflict between the interests registered in different registers, and

(b) C's fee simple and D's fee simple are registered interests each of which is derived from one of the root registered interests.

Section 5.8 applies in policy because there are two contradictory statements of the law, one of which says that C is the owner and the other of which says that D is the owner, and there is no other rule or principle which determines who is to be treated as the legal owner of Greyacre.

Section 5.8(4)

1. If section 5.8 applies, section 5.8(4) determines how the conflict is to be resolved. It does so by laying down three rules. The application of these rules can be illustrated by example, using the facts in Example 3 above, in which D acquired an interest in Greyacre from A and is recorded or registered in Register 1, while C acquired a conflicting interest in Grayacre from B and is recorded or registered in Register 2. The examples are as follows:

Example 1

A or D is in possession. Rule 1 says D will win. Alternatively, if B or C is in possession, Rule 1 says that C will win. If none of A, B, C and D is in possession, Rule 1 will not decide the issue.

Example 2

None of A, B, C and D is in possession. D gave value to A and C did not give value to B. Rule 2 says that D will win. Alternatively, if C gave value to B and A did not give value to D, Rule 2 says that C will win. If neither D nor C gave value, or if both C and D gave value, Rule 2 will not decide the issue.

Example 3

If none of A,B,C and D is in possession, and if neither or both of C and D gave value, Rule 3 says that D will win, because, on the hypothetical facts, A was entitled to have B's registration cancelled before either C or D acquired an interest.

2. The examples deal with cases in which there is only one derived interest recorded or registered in each of the conflicting registers. Under section 5.8(4), if one interest recorded or registered in one register wins, all interests in that register which are derived from the root registered interest will win.

3. Under section 5.8(4), the winning interests are entitled to be enforced with priority over the losing interests. Recorded or registered interests in one register may be subordinated to the recorded and registered interests in the other, or registrations may be cancelled under section 5.4(1)(e). The precise remedy will depend upon the circumstances.

4. Under section 5.8(5), the losing interests will be entitled to compensation.

PART 6

INTERESTS OVERRIDING REGISTER

[Section 6.1 - Interests overriding register]

6.1 Notwithstanding sections 4.5 and 5.3, the following interests, and no other interests, whether or not recorded or registered, shall be enforced with priority relative to all other interests according to law:

(a) except when the interest has been expressly registered under this Act, an interest of the Crown in right of [*enacting jurisdiction*] reserved in or excepted from the original grant of the fee simple absolute from the Crown either expressly or pursuant to an Act;

(b) a tax lien in favour of a municipality;

NOTE: An enacting jurisdiction may wish to include as overriding interests other tax liens which are of general application and knowledge and which it would not be efficient to record in the registers.

(c) a leasehold for a term of 3 years or less if

(i) there is actual possession of the land under the lease, and

(ii) that possession could be discovered through reasonable investigation;

(d) a utility interest in land which was previously vested in either the Crown or a municipality if, immediately prior to the transfer or transmission from the Crown or the municipality,

(i) the land was not included in a register established under this Act, and

(ii) the land was subject to the utility interest;

NOTE: Paragraph (d) is optional.

(e) an interest created under an Act which expressly refers to this Act and expressly provides that the interest is enforceable with priority otherwise than as provided in this Act.

Annotation

Section 6.1

Section 6.1 of the Model Act recognizes the following overriding interests:

(a) reservations or exceptions in the original grant of the fee simple absolute from the Crown either expressly or pursuant to an act.

Section 6.1(a) recognizes the public interest in retaining what is excepted or reserved. However, it adopts what is essentially the Saskatchewan and Ontario position, namely, that the register, by making an express statement (e.g., "minerals included") can override the otherwise overriding exception or reservation. It would thereby make a change in the existing law of some other jurisdictions.

(b) a tax lien in favour of a municipality.

On the one hand, it is not practicable to keep up to date tax information in a land registration office, so that purchasers must obtain it from municipal authorities anyway. On the other, privately owned land is so close to universally subject to municipal taxes that purchasers will not fall into the trap of thinking that because the municipality's claim is not shown on the land register it does not exist.

The note to section 6.1(b) provides for conferring priority upon other unrecorded and unregistered tax liens if the same justifications exist.

(c) a leasehold for a term of 3 years or less if there is actual possession under the lease and the possession could be discovered through reasonable investigation.

This exception is a significant derogation from facility of transfer, as the existence of a lease of anything up to 3 years could be a significant derogation from rights of ownership which could be discovered only by on-side investigation. However, requiring short term tenancies to be recorded or registered would be an unconscionable burden on tenants and upon land registration offices. This is a somewhat revised version of existing overriding interests.

(d) an interest created under another statute, but only if the other statute refers to the title registration statute and expressly provides that the interest is enforceable with priority other than as prescribed by the title registration statute.

This provision recognizes the power of legislatures to give overriding effect to interests in land created under other statutes, but would avoid conferring overriding effect inadvertently.

PART 7

COMPENSATION

[Section 7.1 - Grounds for compensation]

7.1

(1) Except as provided in section 7.4, a person who sustains loss through

(a) a revision of registrations, a recording, or a cancellation of a recording, which is not authorized by this Act, or

(b) an omission to revise registrations, or to make or cancel a recording, as required by this Act,

is entitled to be compensated for the loss sustained.

(2) A person who is the owner of a recorded subsequent interest is entitled to be compensated if

(a) a recording of a prior interest was cancelled upon the submission to the Registrar of a request for cancellation of the recording which was not authorized by the claimant under the recording of the prior interest but which the person obtained

(i) under a transaction entered into for value,

(ii) in the belief that it was authorized by the claimant under the recording of the prior interest and was intended to terminate the prior interest or to allow a subsequent interest to be enforced with priority over it, and

(iii) without knowledge of the facts which rendered it invalid, and

(b) the person sustains loss because the prior interest is enforceable with priority over the recorded subsequent interest under section 4.5(2).

Annotation

Section 7.1

1. Section 7.1(1) confers a right to compensation for loss sustained as a result of a malfunctioning of the interest recording\title registration system. The system malfunctions either when an entry (a recording, registration, cancellation or postponement) is made which is not authorized by the system or when an entry is not made which is required by the system. An example of the former is the registration of an interest based upon a forged or unauthorized document or the registration of a greater interest than is conveyed by an authorized document. An example of the latter is a failure to record a proper document submitted for recording.

2. Regulations will prescribe the form of documents submitted for registration and will prescribe the way in which documents are to be authenticated. It is intended that Registrars will accept for registration documents which comply with the regulations and that they will not make independent investigations to determine the authenticity or validity of documents. Nevertheless, if a Registrar accepts for registration a document which does not embody a valid transaction, and if the registration brings about the cancellation or subordination of a registered interest, the deprived or subordinated owner is entitled to compensation under section 7.1(1). In one sense, the system will have operated as it is intended to operate, but the registration is nevertheless unauthorized by the statute and, in another sense, the system will have malfunctioned.

3. Compensation will sometimes be payable under the Model Act even if an unauthorized document is tendered by the person who suffers loss. Section 5.6(3) so provides in the case of the registration of a forged or unauthorized document (though the court may instead confirm the registration under section 5.6(4) and direct that a prejudiced owner be compensated instead). Section 7.1(2) so provides in the case of the cancellation of a recorded interest on the basis of an unauthorized request for cancellation. In each case, in order to be afforded a remedy, the person who tenders the document must have acquired it in the belief that it was authorized and without knowledge of the facts which rendered it unauthorized. In addition, in the case of an unauthorized request for cancellation of a recording under section 7.1(2), the person who tendered it must have given value and must have believed that the underlying interest was being terminated.

[Section 7.2 - Amount of compensation]

7.2 The compensation shall be,

(a) if a person is deprived of an interest, the value of the interest, or

(b) if the priority of an interest of a person is subordinated, the reduction in value of the interest,

determined as of

(c) the date on which the person submits a claim for compensation to the Registrar General, or

[redacted]

(d) the date on which the person commences an action for compensation,

whichever is earlier.

Annotation

Section 7.2

1. The first thing that section 7.2 does is to establish a standard by which compensation for a compensable loss is to be quantified. As system malfunction results in the deprivation or subordination of an interest, it is the value of the interest (in the case of deprivation) or the reduction in value of the interest (in the case of subordination) which determines the amount of compensation. Under sections 7.5 and 7.6, interest and either expenses or costs may be payable in addition to the compensation.

2. The second thing that section 7.2 does is to prescribe the date as of which compensation is to be quantified, so that compensation will not be quantified as of the date of the malfunctioning of the system. The date prescribed by section 7.2(c) and (d) is the earlier of the date on which the claimant submits a claim for compensation to the Registrar General under section 7.5 and the date on which the claimant commences an action in court under section 7.6.

[Section 7.3 - Limitation of time]

7.3 The person ceases to be entitled to compensation unless, before the expiration of two years after he knows or ought to know of the loss sustained or within such further time as is agreed to by the Registrar General, he either

(a) enters into an agreement with the Registrar General providing for the payment of compensation, or

(b) commences an action for compensation in the Court.

Annotation

Section 7.3

A person who sustains loss because of an unauthorized entry in a register or because of the omission to make a required entry should bring a claim for compensation promptly. Section 7.3 therefore prescribes a limitation period of two years. However, the time does not start to run until the claimant knows or ought to know of the loss sustained, so that a claimant is protected against losing an entitlement to compensation before he or she could be reasonably expected to know of the loss.

Submitting a claim to the Registrar General will not of itself stop the time from running: a concluded agreement is necessary. A prudent claimant will therefore commence an action in court before the two year period could possibly have elapsed on any view of the facts. However, the commencement of an action will be rendered unnecessary if the Registrar General agrees to an extension of the time, which would probably be done if there are serious negotiations on foot.

[Section 7.4 - When compensation not payable]

7.4 A person is not entitled to compensation if the loss was sustained because the person, with actual knowledge of an interest which could be recorded under section 5.7(1), failed to record the interest promptly.

Annotation

Section 7.4

Under section 5.7(1), an owner who is deprived of a registered interest by an unauthorized registration is entitled, under a statutory interest which can be recorded, to the benefits of the registered interest. That statutory interest may be lost if it is not recorded and if a third person acquires an interest from the owner under the unauthorized registration. The effect of section 7.4 is that a deprived owner who, with knowledge of the facts, loses the interest because of a failure to avail himself or herself of the protection afforded by section 5.7(1), is not entitled to compensation.

[Section 7.5 - Agreement for compensation]

7.5

(1) A person who claims to be entitled to compensation may submit a claim to the Registrar General.

(2) If the Registrar General is satisfied that the person is entitled to compensation, he should enter into an agreement with the person providing for payment to the person of

(a) compensation, and

(b) reasonable expenses of bringing the claim.

NOTE: Each jurisdiction should provide for the payment of interest as if an agreement were a judgment of the Court in accordance with the jurisdiction's prejudgment interest legislation from the date on which the claim is made or action commenced. A jurisdiction which allows prejudgment interest at a real interest rate on general damages should allow interest at that rate from the date of actual or imputed discovery of the loss to the date at which interest at a full rate starts to run.

(3) When an agreement is entered into under subsection (2),

(a) the Registrar General must certify to the Provincial Treasurer that the person is entitled to compensation, expenses and interest as set forth in the agreement,

(b) the person ceases to be entitled to compensation under this Part, and

(c) the person is entitled to receive the compensation, expenses and interest provided for in the agreement.

Annotation

Section 7.5

Section 7.5 provides a statutory procedure under which a person who claims to be entitled to compensation may negotiate a settlement of the claim with the Registrar General covering compensation, reasonable expenses of bringing the claim, and interest. Once the agreement is reached, it is enforceable and takes the place of the claim for compensation.

A similar agreement may be negotiated under section 5.6(6) and is deemed to be an agreement under section 7.5(2).

[Section 7.6 - Judgment for compensation]

7.6

(1) A person who claims to be entitled to compensation may commence an action in the Court naming the Registrar General as defendant.

(2) The Court may give judgment

(a) declaring that the person is entitled to compensation, and

(b) determining the amount of compensation and costs.

NOTE: Each jurisdiction should provide for the payment of prejudgment interest in accordance with the jurisdiction's prejudgment interest legislation from the date on which the claim is made or action commenced. A jurisdiction which allows prejudgment interest at a real interest rate on general damages should allow interest at that rate from the date of actual or imputed discovery of the loss to the date at which full prejudgment interest starts to run.

[Section 7.7 - Payment of compensation]

7.7 Upon receipt of

- **(a) a certificate of the Registrar General under section 7.5(3), or**
- **(b) a judgment of the Court under section 7.6(2) or section 5.6,**

the [*minister responsible for financial administration*] shall, subject to any regulations under section 2.3(f), pay to the person the amounts of compensation, expenses, costs and interest provided for therein.

NOTE: an enacting jurisdiction may need to adjust this subsection to fit its financial administration legislation or regulations.

Annotation

Section 7.7

Once a claimant has entered into an agreement with the Registrar General for compensation, expenses and interest, the financial minister must pay the agreed amount. Once the appropriate court has given judgment for compensation, costs and interest, either under section 7.6(2) or section 5.6, the financial minister must pay the amount of the judgment. However, regulations under section 2.3 may limit the amount payable.

Section 7.7 does not designate the source of payment. A province or territory may maintain an actual or notional compensation fund or may deal with fees and payments as general revenue matters.

[Section 7.8 - Liability of wrongdoer]

7.8

(1) In subsection (2), "wrongful act" does not include an act or omission which is merely careless or negligent.

(2) If the loss for which compensation is payable under section 7.5 or section 7.6 was caused in whole or in part by a wrongful act, the person who committed the wrongful act, other than a Registrar or an employee of the land registration office, is liable to the Government for the amount of the compensation or for such portion thereof as the Court finds to be just and equitable, having regard to the extent of the person's responsibility for the loss.

(3) The liability of the person may be enforced by

(a) the Registrar General in an action brought against the Registrar General for compensation under section 7.6, or

(b) the [*minister responsible for financial administration*] in an action brought against the person.

Annotation

Section 7.8

Section 7.8 confers upon the Government a right of contribution from a person whose intentionally wrongful act causes or contributes to loss for which compensation is payable. An example is a rogue who forges a transfer from a registered owner, delivers it to a purchaser, and collects the proceeds. The contribution could be the full amount if the appropriate court decides that, having regard to the responsibility of the person, full indemnity would be just and equitable.

PART 8

POWERS OF COURT

[Section 8.1 - Application by aggrieved person]

8.1 A person who objects to

(a) a recording or the cancellation of a recording,

(b) a revision of registrations, or

(c) any decision of a Registrar with respect to any action he is required or authorized to take under this Act,

may apply to the Court for an order requiring the Registrar to take any action he is required or authorized to take under this Act, and on the application the Court may so order and make any further order it thinks proper.

Annotation

Section 8.1

Section 8.1 provides, in effect, for judicial review of a Registrar's actions and decisions, which may affect only the applicant or may affect the relative rights of the applicant and others.

[Section 8.2 - Application by Registrar General]

8.2 The Registrar General may apply to the Court for directions in respect of any matter concerning his or a Registrar's duties under this Act, and on the application the Court may give any directions and make any further orders it thinks proper.

[Section 8.3 - General jurisdiction of Court]

8.3 In any proceeding with respect to an interest, the Court may direct a Registrar to

- **(a) record an interest or cancel a recording, or**
- **(b) revise registrations.**

Annotation

Section 8.3

Section 8.3 would give the appropriate court power to direct a Registrar to make entries in a register to implement a decision of the Court determining the relative rights of parties in a proceeding.

[Section 8.4 - Method of application]

8.4 An application to the Court under this Act may be made in a summary manner in accordance with the Rules of Court by originating notice, petition or otherwise as the rules provide, and subject to any order respecting notice to interested parties, or any further order the Court thinks proper.